

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

#### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

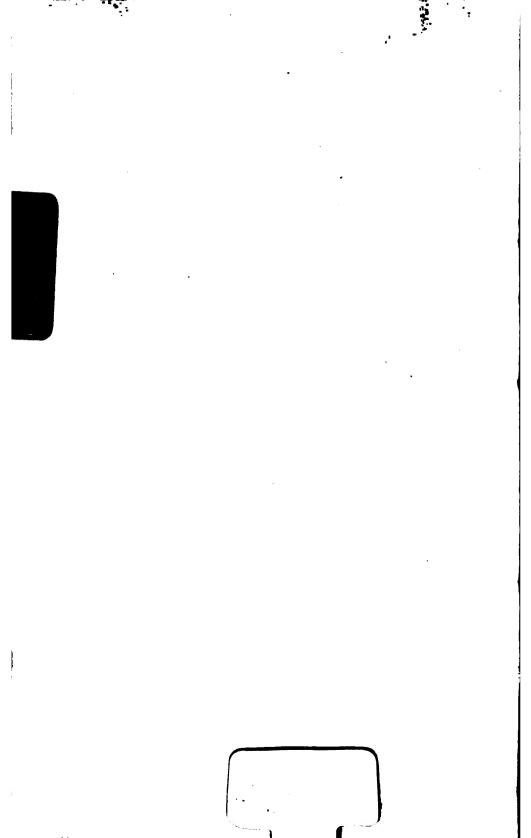
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + Refrain from automated querying Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + Keep it legal Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

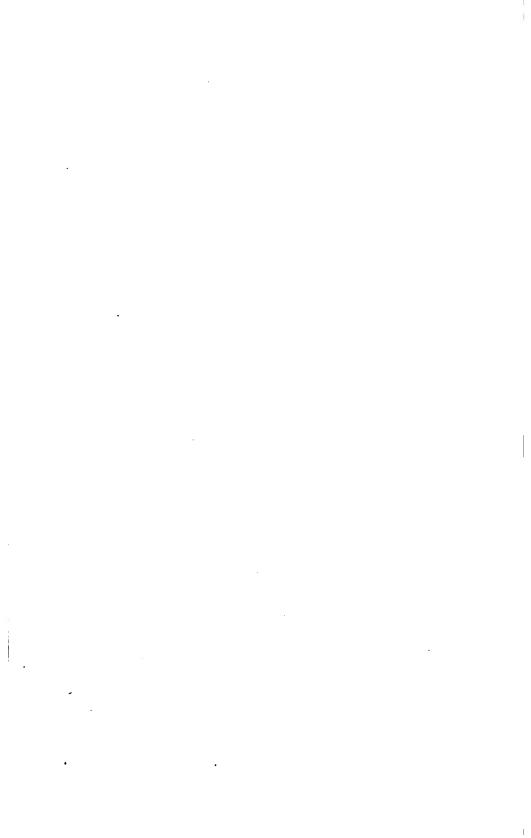
#### **About Google Book Search**

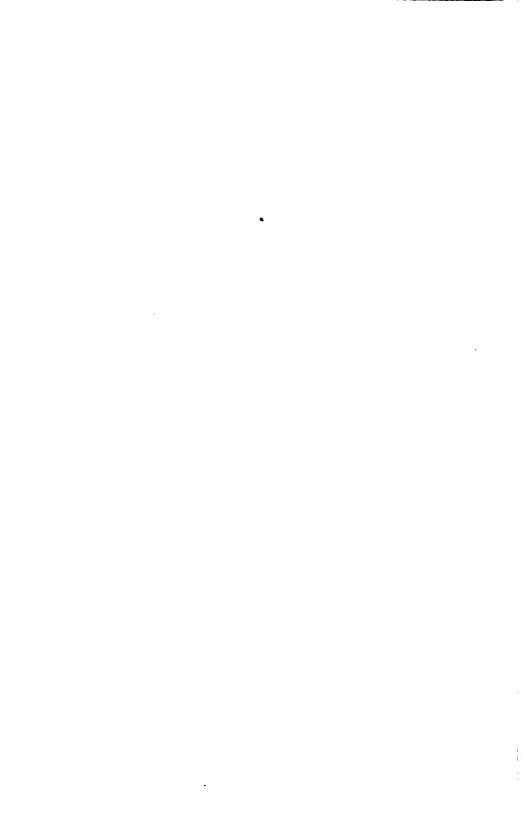
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <a href="http://books.google.com/">http://books.google.com/</a>

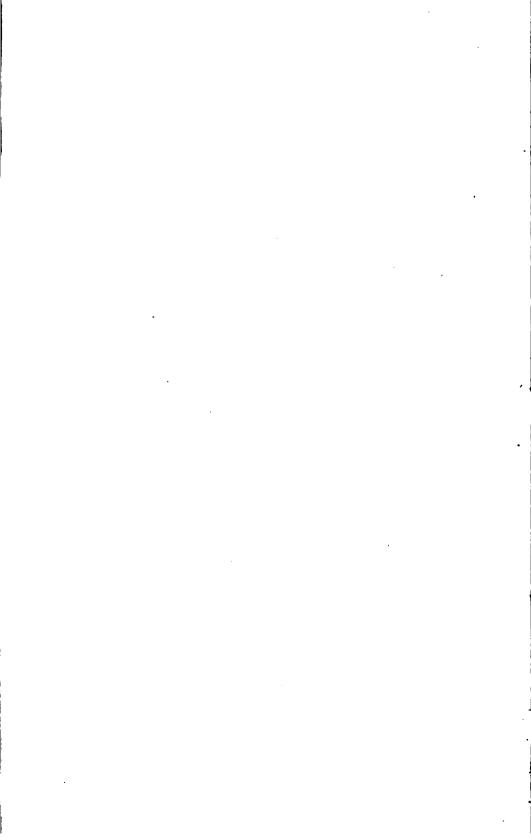




Sugario se







## REPORTS OF CASES

DECIDED IN THE

•

# EHIGH COURT OF CHANCERY,

BY THE

# RIGHT HON. SIR J. L. KNIGHT BRUCE,

BY

EDWARD YOUNGE, OF THE MIDDLE TEMPLE, Esq., AND JOHN COLLYER, OF LINCOLN'S INN, Esq.,

VOL. I.

MICHAELMAS TERM, 1841, to TRINITY TERM, 1842.

#### LONDON:

S. SWEET, A. MAXWELL & SOFT AND V. & R. STEVENS & G. S. NORTON,

Tam Modsellers and Publishers;

DUBLIN:

ANDREW MILLIKEN, GRAFTON STREET.

1843.

LIBRARY OF THE
LELAND STAMFORD, JR., UNIVERS.; Y
LOW, DEMANDERT

a. 56445

JUL 23 1901

LONDON

W. M'DOWALL, PRINTER, PEMBERTON-ROW, GOUGH-SQUARE,

LORD LYNDHURST, Lord High Chancellor.

LORD LANGDALE, Master of the Rolls.

SIR LANCELOT SHADWELL, Vice-Chancellor of England.

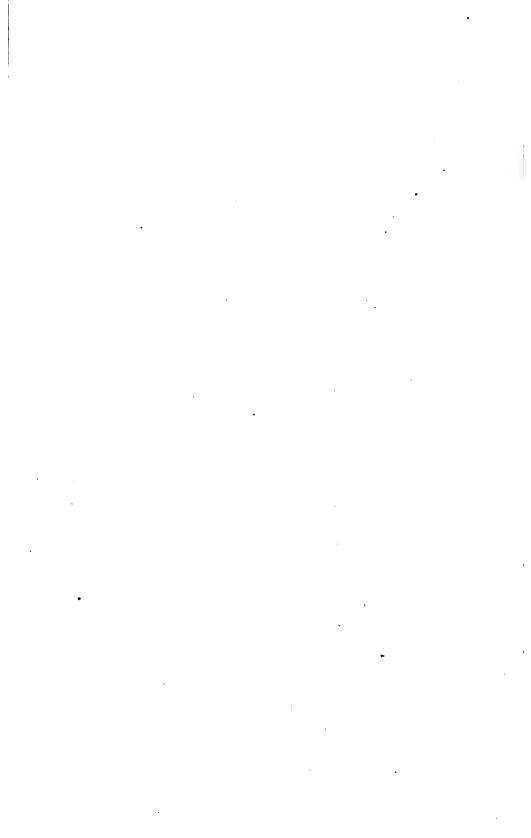
SIR JAMES L. KNIGHT BRUCE

SIR JAMES WIGRAM .

Vice-Chancellors.

SIR FREDERICK J. POLLOCK, Attorney-General.

SIR WILLIAM WEBB FOLLETT, Solicitor-General.



## TABLE

OF THE

## NAMES OF THE CASES REPORTED

#### IN THIS VOLUME.

| Аввеч v. Ретсн - 258               | Caldecott v. Caldecott 312, 737 |
|------------------------------------|---------------------------------|
| Adams v. Broke - 627               | Campbell v. Home 664            |
| , Liardet v 527(n.)                | Clarendon (Earl of) v. Bar-     |
| Armytage v. Armytage - 461         | ham 688                         |
| Attorney-Gen. v. Brandreth 200     | Clark, Holland v 151            |
| v. Compton 417                     | Clarke v. Lubbock 492           |
| v. Cullum - 411                    | ——, Rose v 534                  |
| v. Dixon - 614                     | v. Wilmot 53                    |
|                                    | Claxton, Wardell v 265          |
| Bagster, Hopkinson v 13            | Clifford v. Turrell 138         |
| Baker, Smith v 228                 | Cockerell, Garratt v 494        |
| Balguy, Broadhurst v 16            | Colt, Searle v 86               |
| Barham, Clarendon (Earl of) v. 688 | Combe v. Corporation of         |
| Barnes v. Racster - 401            | London 631                      |
| Barrs v. Jackson 585               | Compton, Attorney-Gen. v. 417   |
| Baugh, Essex v 620                 | Connop v. Hayward - 88          |
| Bell, Consett v 569                | Consett v. Bell 569             |
| —, Goodwin v 181                   | Coppin v. Gray 205              |
| Benson v. Heathorn - 326           | Cragg v. Ford - 280, 285        |
| Bevill, Thornbury v 554            | Cullum, Attorney-Gen. v 411     |
| Bonner, Pitt v 670                 | Cumming v. Slater 484           |
| Booth, Sillick v. 117, 121, 739    |                                 |
| Boss v. Godsall 617                | Daniel v. Harding 436           |
| Boyes v. Liddell 133               | , Ryan v 60                     |
| Brandreth, Attorney-Gen.v. 200     | Davis v. Hole 440               |
| Broadhurst v. Balguy - 16          | Dew, Dowell v 345               |
| Broke, Adams v 627                 | Dinsdale v. Dudding - 265       |
| Brooks v. Purton, 271, 273, 278    | Dixon, Attorney-Gen. v 614      |
| Burridge v. Rowe - 183, 583        | ——, Haigh v 180                 |
| Burton, Manson v 626               | ——, Husham v 203                |
|                                    |                                 |

| Dobson $v$ . Lee -  | -        | 714  | James, Symes v   | _            | 481  |
|---|----------|--|--|--------------|--|
| Dowell v. Dew -   | _        | 845  | Jellicoe v. Price -  | -            | 74   |
| Drant v. Vause -  | _        | 580  | Jenkins, Tait v.   | -            | 492  |
| Dryden v. Walford -   | _        | 625  | Jones, Thomas v  | _            | 510  |
| Dudding, Dinsdale v.  | -        | 265  | ,  |              |  |
|   |          |  | Keaton v. Lynch -  | _            | 437  |
| Eades v. Harris -   | _        | 230  | Kelly v. Hooper -  | _            | 197  |
| Essex v. Baugh -  | _        | 620  |  |              |  |
| Eyston v. Symonds -   | _        | 608  | Lade, Newman v   | -            | 680  |
|   |          |  | Lang v. Pugh -   | -            | 718  |
| Field, Ex parte -   | -        | 1  | Langley, Helsham v.  | -            |  |
| Ford, Cragg v   | 280,     |  | Latham, Oliver v   | -            | 243  |
| Franklin, Mason v.  | -        |  | Lee, Dobson v  | -            | 714  |
| Frearson, James v   |          |  | Liardet v. Adams   |              | 7 (n.)   |
| Fry, Story v.   |          | 603  | Liddell, Boyes v   |              | 138  |
| 11y, 5001y 0.   | _        | 000  | Lister, Stubbs v   |              | 81   |
| Garratt v. Cockerell -  |          | 494  | Livie, Morris v  | _            | 380  |
| Godfrey v. Maw -  | _        | 485  | Lloyd v. Lloyd -   | _            | 181  |
| Godsall, Boss v   |          | 617  | Lockwood, Wright v.  |              | 118  |
| Goodwin v. Bell -   | -        | 181  | London (Corporation  | o <b>s</b> \ | 110  |
|   |          | 56   | ~ ` -  | of),         | <i>Q</i> 01  |
| Gow, Miller v   |          |  |  | -            | 681  |
| Gray, Coppin v.   |          | 205  | Lubbock, Clarke v  | -            | 492  |
| Great Western Rail  | •        | 100  | Lynch, Keaton v  | -            | 437  |
|   |          |  |  |              |  |
| Company, Storer v.  | -        | 180  | Manager at Durates   |              | 200  |
| 2 0   | -        |  | Manson v. Burton -   | -            | 626  |
| Haigh v. Dixon -  | -        | 180  | Marchant, Parker v.  | -            | 290  |
| Haigh v. Dixon -<br>Harding, Daniel v   | <u>-</u> | 180<br>436   | Marchant, Parker v.<br>Marshall, Witty v   | -            | 290<br>68  |
| Haigh v. Dixon - Harding, Daniel v Harris, Eades v  | -        | 180<br>436<br>230  | Marchant, Parker v.<br>Marshall, Witty v<br>Martin, Hudson v   | -<br>-       | 290<br>68<br>552   |
| Haigh v. Dixon - Harding, Daniel v Harris, Eades v Hartley, Tullock v   | -        | 180<br>436<br>230<br>114   | Marchant, Parker v. Marshall, Witty v. Martin, Hudson v. Martindale, Taylor v.   | -<br>-       | 290<br>68<br>552<br>658  |
| Haigh v. Dixon Harding, Daniel v. Harris, Eades v. Hartley, Tullock v. Harvey, Osborne v.   | -        | 180<br>436<br>230<br>114<br>116  | Marchant, Parker v. Marshall, Witty v. Martin, Hudson v. Martindale, Taylor v. Mason v. Franklin   | -            | 290<br>68<br>552<br>658<br>289   |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v.  | -        | 180<br>436<br>230<br>114<br>116<br>83  | Marchant, Parker v. Marshall, Witty v. Martin, Hudson v. Martindale, Taylor v. Mason v. Franklin Maule, Rogers v.  | -            | 290<br>68<br>552<br>658<br>289<br>6  |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v.  | -        | 180<br>436<br>230<br>114<br>116<br>33<br>326   | Marchant, Parker v. Marshall, Witty v. Martin, Hudson v. Martindale, Taylor v. Mason v. Franklin Maule, Rogers v. Maw, Godfrey v.  | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485   |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley   | -        | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175  | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235  |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v.  |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481   | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56  |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v   |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481   | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380   |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v   |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3  | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380   |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark -  |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151  | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680                                    |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark Home, Campbell v   |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664                                   | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380   |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark Home, Campbell v Hooper, Kelly v   |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197                            | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie - Newman v. Lade Nicholls, Hosking v.   | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478                             |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster  |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>18                      | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham -  | -            | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478                             |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls -                                      |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>18                      | Marchant, Parker v.  Marshall, Witty v  Martin, Hudson v  Martindale, Taylor v.  Mason v. Franklin -  Maule, Rogers v  Maw, Godfrey v  May v. Selby -  Miller v. Gow -  Morris v. Livie -  Newman v. Lade  Nicholls, Hosking v.  Oliver v. Latham -  —, Vickers v  |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478<br>243<br>211               |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls - Hudson v. Martin -                   |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>18<br>478<br>552        | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham -  |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478                             |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls -                                      |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>18                      | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham - —, Vickers v Osborne v. Harvey -                                     |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478<br>243<br>211<br>116        |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls - Husham v. Dixon -                    |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>13<br>478<br>552<br>203 | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham - —, Vickers v Osborne v. Harvey -                                     |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478<br>243<br>211<br>116<br>290 |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls - Hudson v. Martin - Husham v. Dixon - |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>18<br>478<br>552<br>203 | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham - —, Vickers v Osborne v. Harvey -  Parker v. Marchant - Parr, Slade v |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>478<br>243<br>211<br>116<br>290<br>565 |
| Haigh v. Dixon Harding, Daniel v Harris, Eades v Hartley, Tullock v Harvey, Osborne v Hayward, Connop v. Heathorn, Benson v. Helsham v. Langley Henderson, Therry v. Hilder, Pelham v Hole, Davis v Holland v. Clark - Home, Campbell v Hooper, Kelly v Hopkinson v. Bagster Hosking v. Nicholls - Husham v. Dixon -                    |          | 180<br>436<br>230<br>114<br>116<br>33<br>326<br>175<br>481<br>3<br>440<br>151<br>664<br>197<br>13<br>478<br>552<br>203 | Marchant, Parker v. Marshall, Witty v Martin, Hudson v Martindale, Taylor v. Mason v. Franklin - Maule, Rogers v Maw, Godfrey v May v. Selby - Miller v. Gow - Morris v. Livie -  Newman v. Lade Nicholls, Hosking v.  Oliver v. Latham - —, Vickers v Osborne v. Harvey -                                     |              | 290<br>68<br>552<br>658<br>289<br>6<br>485<br>235<br>56<br>380<br>680<br>478<br>243<br>211<br>116<br>290 |

#### TABLE OF CASES.

| Perry v. Walker 672             | Story v. Fry -         | - | 603        |
|---------------------------------|------------------------|---|------------|
| Petch, Abbey $v$ 258            | Stubbs v. Lister -     | - | 81         |
| Pidgeley v. Rawling 552         | Symonds, Eyston v      | - | 608        |
| Pitt v. Bonner 670              | Symons v. James -      | - | 487        |
| Prendergast v. Turton - 98      | •                      |   |            |
| Price, Jellicoe v 74            | Tait v. Jenkins -      | - | 492        |
| Pugh, Lang v 718                | Taylor v. Martindale   | - | 658        |
| Purton, Brooks v. 271, 273, 278 | v. Rundell -           | _ | 128        |
|                                 | v. Taylor -            | - | 727        |
| Racster, Barnes v 401           | Therry v. Henderson    | _ | 481        |
| Rawling, Pidgeley v 552         | Thomas v. Jones -      | - | 510        |
| Robertson, Whitmarsh v 715      | Thorby v. Yeats -      | - | 438        |
| Robinson v. Rosher 7            | Thornbury v. Bevill -  | - | <b>554</b> |
| Rogers v. Maule 6               | Tower, Shipperdson v.  | _ | 441        |
| Rose v. Clarke 534              | Treweek v. Turner -    | _ | 112        |
| Rosher, Robinson v 7            | Tubb, Wentworth v.     | _ | 171        |
| Rowe, Burridge v. 183, 583      | Tulloch v. Hartley -   | _ | 114        |
| Rundell, Taylor v 128           | Turner, Treweek v      | _ | 112        |
| Ryan v. Daniel 60               | Turrell, Clifford v    | _ | 138        |
|                                 | Turton, Prendergast v. | - | 98         |
| Sandilands, Spooner v 890       | ,                      |   |            |
| Scawin v. Ścawin 65             | Vause, Drant v         | _ | 580        |
| Searle v. Colt 36               | Vickers v. Oliver -    | - | 211        |
| Selby, May v 235                |                        |   |            |
| Shaw v. Simpson 732             | Walford, Dryden v      | - | 625        |
| Shipperdson v. Tower - 441      | Walker, Perry v        |   | 672        |
| Sillick v. Booth 117, 121, 739  | Wardell v. Claxton -   | _ | 265        |
| Simpson, Shaw v 732             | Wentworth v. Tubb -    | - | 171        |
| Slade v. Parr 565               | Whitmarsh v. Robertson | - | 715        |
| Slater, Cumming v 484           | Wilkins v. Stevens -   | - | 431        |
| Smith v. Baker 223              | Wilkinson v. Wilkinson | - | 657        |
| v. Spencer 75                   | Wilmot, Clarke v       | _ | 53         |
| Spencer, Smith v 75             | Wilson v. Squire -     | - | 654        |
| Spooner v. Sandilands - 890     | Witty v. Marshall -    | _ | 68         |
| Squire, Wilson v 654            | Wright v. Lockwood     | - | 113        |
| Stevens, Wilkins v 431          | <u> </u>               |   |            |
| Storer v. Great Western         | Yeats, Thorby v        | - | 438        |
| Railway Company - 180           | •                      |   |            |
|                                 |                        |   |            |

#### ERRATA.

Page 41. For 9 Sim. 81, read 9 Sim. 89.

42. For 6 B. & Ald., read 5 B. & Ald.

53. See first marginal note corrected in the Index.

93. For 2 Sim. & St., read 1 Sim. & St.

121, Line 4. Dele the words "of presumption."

126, Line 12. Dele the words "in life."

415, Last line but 9. For "effect," read "defect."

## REPORTS OF CASES

#### ARGUED AND DETERMINED

IN THE

## Digh Court of Chancery.

COMMENCING IN

MICHAELMAS TERM, 5 VICT. 1841.

#### Ex parte FIELD.

THIS was a petition by a party who was entitled to a Semble, that reversionary interest in certain stock standing in the the sections of the name of a surviving trustee, to restrain the Governor stat. 5 Vict. c. and Company of the Bank of England from transferring ferent subjects. the stock without notice to the petitioner. It appeared an application that the officers of this Court had refused to issue a dis- to the Court tringas under the 5th section of the stat. 5 Vict. c. 5, mer section, it and, therefore, the present application was made under the on affidavit ex-4th section. It was suggested that the trustee was likely tive terms. to sell the stock and abscond; but there was no affidavit to that effect.

Mr. Elmsley, for the petitioner, upon being questioned by the Court as to the want of an affidavit, contended, that, according to the practice in the Exchequer, which was now the practice in the Court of Chancery, no affidavit was necessary; and that the 4th and 5th sections of the act applied to the same subject-matter, the former section giving jurisdiction to the Court, and the latter providing VOL. I. N. C. C.

1841.

5, relate to dif-

To authorize under the formust be founded

Ex parte FIELD. certain mechanical details by which the Court was to carry the jurisdiction into effect.

THE VICE-CHANCELLOR.—My present impression is, that I ought not to make an order under the 4th section of the act without an affidavit. Under the 5th section, I think I should be authorized to make an order, which might issue in the same manner, and be attended with the same consequences as the writ in the Exchequer; where, however, the practice was to issue the writ without any application to the Court at all, and I should be sorry to introduce a practice tending to increase expense. I make no order on this petition; but you have my opinion, that the officers of the Court ought to issue a distringas, without the order of the Court, under the same guards, and in the same manner, as the officers did in the Court of Exchequer (a).

Nov. 3rd.

In consequence of the opinion expressed by the Court, as to the necessity of an affidavit in support of an application to the Court under the 4th section of the statute,

Mr. Elmsley, on a subsequent day, produced the affidavit of the petitioner's solicitor, which was to the effect, that the deponent had been informed, and believed, that it was the intention of the trustee to sell out the stock and leave the country. The Vice-Chancellor however, was of opinion that the affidavit was insufficient, and refused to make the order.

(s) This is now provided for by Ord. 17th Nov. 1841.

1841.

#### PELHAM V. HILDER.

THE bill, which had been originally filed by Mr. Cresset An admission Pelham, and on his death revived by his personal repre- he has sold prosentative, stated, that the defendant had for many years perty of his been Mr. Pelham's land agent and surveyor; and that, since 1832, or the beginning of 1833, the defendant, as cipal to an insuch agent, had sold, or caused to be sold, divers large ful default, if quantities of farming produce, and live and dead stock; the agent insist by his answer and that he had cut down divers fagots and timber trees that the credit of great value, and had sold, or caused to be sold, the same, usual way of or some part thereof; and that the produce of the sale the plaintiff amounted to a large sum of money, and was received by make out no the defendant as such agent, or, but for his wilful default, trary. might have been received by him. The bill prayed the usual accounts, and also an account of the sums which might have been so received but for the defendant's wilful default.

The defendant, by his answer, admitted that some part of the farming produce, and other particulars mentioned in the bill, were sold on credit, but not otherwise than in the usual way of business; and that, when he quitted the agency, some of the sums owing for these matters were not paid. but he believed that those sums had been received by subsequent agents. And for the particulars of the property sold upon credit, and the persons to whom it was sold, he referred to his books of account and to his former answer, which, he alleged, contained a minute detail of his dealings and transactions as agent, including the particulars of such sales on credit.

No evidence was entered into on either side.

Mr. Simpkinson and Mr. De Gex, for the plaintiff, suggested that the decree should contain an inquiry as to the wilful default; and they referred to Lady Ormond v. Hutch-

Nov. 4th. by an agent, that principal upon credit, will not entitle the prinwas given in the case to the conPELHAM V. HILDER inson (a). [The Vice-Chancellor.—In the case of a mort-gagee, it is the constant course to direct such an inquiry; in the case of a trustee it is never done without a special case.]

#### Mr. G. L. Russell for the defendant.

THE VICE-CHANCELLOR.—It appears to me, that no case of wilful default has been admitted by the defendant. He states by his answer, that he sold some of the property upon credit in the usual wayof business, and for the particulars he refers to his books and his former answer. He says, he believes, that, since the determination of his agency, the money has been received; but whether it has been received or not, the credit is stated by him to have been given in the usual way of business, and the plaintiff has not entered into any evidence to rebut the statement.

(a) 16 Ves. 97.

#### ROGERS v. MAULE.

Nov. 4th.

A. died intestate, unmarried, and illegitimate, having mortgaged his real estates to B. for 500 years, and having subsequently mortgaged them to B. for an additional sum, by deposit of the title-deeds.

The fee-simple

THIS was a creditors' suit for administering the real and personal estate of Josiah Manning Bolton Brown, who died intestate, unmarried, and illegitimate. The defendants were George Maule, as administrator of the deceased under the Crown, John Rogers, and the Attorney-General. The decree having directed certain inquiries to be made respecting the real estates of the intestate, the Master, in answer to those inquiries, stated, that he found that John Rogers, a defendant to the suit, was, by virtue of an

was not worth the mortgage money:—Held, nevertheless, that the mortgagor could not be deemed a bare trustee for the mortgagee within the stat. 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the Crown of the equity of redemption; but it was ordered, that the estate should be sold in the administration of assets, and B. declared a purchaser, with liberty to apply to the Crown for a grant of the fee-stmple.

indenture of the 2nd November, 1831, mortgagee of the real estates for the term of 500 years, for £100 and interest, and that he was also entitled to an equitable lien on the same estates for the sum of £140 and interest, and that there were no other incumbrances on the estates.

ROGERS 5.

The cause now came on to be heard on further directions, and on the petition of the plaintiff, whereby it was, amongst other things, prayed, that John Rogers, being willing to take the said real estates in full satisfaction of the sum of £240, the amount of the debts so charged on the real estate, he might be at liberty to accept and retain the same in full discharge of such debts; and that he might be considered and confirmed the purchaser of such estate, and the fee-simple and inheritance thereof in possession, free from any equity of redemption affecting the same, and be declared to be the owner thereof, and entitled to a conveyance, grant, or other assurance thereof from the Crown.

It was admitted that the estates were not sufficient in value to pay the mortgagee.

#### Mr. Eade for the plaintiffs.

Mr. Coleridge, for the defendant, John Rogers, submitted, that, under the circumstances of this case, the mortgagor must be considered as a bare trustee of the equity of redemption for the mortgagee, which would prevent the equity of redemption from escheating to the Crown. (Stat. 4 & 5 Will. 4, c. 23, s. 2). This view of the question had been slightly mentioned in Hodge v. The Attorney-General (a), but had evidently not been pressed on the attention of the Court. There it was held, that the Crown could not be foreclosed; but it was the case of an equitable mortgage only. Smyth v. Tyler (b) was the case of a legal

<sup>(</sup>a) 3 You. & Coll. 342.

<sup>(</sup>b) Jurist, Vol. 1, p. 470.

ROGERS 7. MAULE. mortgage. [The Vice-Chancellor.—Your mortgage does not affect the legal fee.]

Mr. Wray, for the Attorney-General, objected to any decree which should go to foreclose the Crown; but he suggested that the estate might be sold, as against the Crown, in the administration of assets.

THE VICE-CHANCELLOR adopted that view of the case.

Ir appearing to the Court that the personal estate of the intestate is insufficient for the payment of his debts, and it also appearing, as well by the admissions of the defendant, George Maule, by his counsel, as by the admissions of the several creditors who have gone in before the Master and established their debts by their counsel, that the value of the fee-simple of the intestate's real estate, together with the rents now due thereon, is considerably less than the amount of the mortgage and lien of the defendant, John Rogers, upon such estate; and the defendant, John Rogers, being willing to take the real estate in the pleadings of this cause mentioned in full satisfaction of the sum of £240 and interest, found by the said report to be a charge upon the real estate, and all interest subsequent to such report, and the said George Maule, the said creditors, and the said defendant, John Rogers, by their counsel, consenting:--IT IS ORDERED, That the said defendant, John Rogers, be at liberty to accept the same in full discharge of the said debt; and it is ordered, that he be, and he is hereby declared to be, and is, the purchaser of such estate, and the fee-simple and inheritance thereof in possession, under the decree of this Court, in the due administration of the assets of the intestate, and to be the owner thereof; and it is ordered, that the said John Rogers be at liberty to apply to the Crown for such grant or other assurance of the legal fee thereof from the Crown as he may be advised; and in the mean time the said defendant, John Rogers, his heirs and assigns, are to hold and enjoy the same estates as his and their own absolute property.

#### ROBINSON v. ROSHER.

GEORGE COOKE, being seised in fee of a messuage in The case of Field-lane, in the parish of St. Andrew's, Holborn, by an indenture, dated the 30th August, 1825, demised the premises to Thomas Marle, for 31 years, at the yearly rent of filed upon the £17. The lease contained the usual covenants to pay the rent, rates, and taxes, and to keep the premises in repair.

After the execution of this lease, Cooke mortgaged the reversion to several persons in succession. These mortgages ultimately became vested in the plaintiffs and their heirs, by virtue of indentures of lease and release, dated the 2nd and 3rd of May, 1836, and made between Griffiths, a former mortgagee, of the first part, Cooke of the second part, and the plaintiffs of the third part, whereby, in consideration of £162 paid by the plaintiffs to Griffiths, and £26 paid by them to Cooke, the reversion in the premises was conveyed to the plaintiffs and their heirs, instead of ensubject to redemption.

At Midsummer, 1836, the plaintiffs, as mortgagees in possession, applied to Marle for payment of his rent, when Marle informed them that he was unable to pay it, and that he had, in June, 1831, deposited his lease with Mr. William Rosher, solicitor for the firm of Jeremiah Rosher & that application Co., lime-burners, as a security for a debt of £64 due from usual nature, him, Marle, to that firm.

In consequence of this information, the plaintiffs' solicitor, on the 25th June, 1836, wrote a letter to William at the hearing. Rosher, who was the son of Jeremiah Rosher, in which, after calling to his attention the non-payment of rent and the dilapidations, he expressed himself thus:- "In the late cases of Flight v. Bentley, and Jenkins v. Portman, the ties in conflict

Nov. 5th.

Moores v. Choat, 8 Sim. 508, approved. A bill was authority and under the circumstances of Flight v. Bentley. After issue joined, the case of Moores v. Choat was decided, and the decision was soon afterwards published by the regular Reporter of the Court. The plaintiffs then entered into evidence :- Held, that, although the plaintiffs, tering into evidence, might have applied to the Court by interlocutory motion to have the bill dismissed without costs, yet, as was not of a they were enti-tled to have the bill dismissed. without costs,

If a bill is correctly filed on the authority of a reported case, there being no authoriwith it, and the decision in the

reported case is afterwards reversed, the plaintiff in the suit, filed on its authority, is entitled, on motion, to have his bill dismissed without costs.

1841.
ROBINSON
v.
ROSHER.

Vice-Chancellor and Master of the Rolls, following up the principle of *Lucas* v. *Comerford* (1 Ves. jun.), held, that an equitable mortgagee is liable for rent and dilapidations; hence, your father is considered to be so liable in this instance."

This letter being ineffectual in procuring either the delivery up of the lease or the performance of the covenants, the plaintiffs' solicitor wrote again to William Rosher, requesting him to furnish the name or names of his father, to insert in a bill in Chancery, and also to accept service of the subpœna. This produced a reply, dated the 12th November, 1836, in which William Rosher stated the Christian name of his father to be Jeremiah, and agreed to accept service. He at the same time offered to give up the lease, without prejudice to his client's claim, to any person whom Marle might authorize to receive it, on payment of £20. This offer the plaintiffs' solicitor refused to accept.

In pursuance of these proceedings the plaintiffs, on the 22nd November, 1836, filed their bill against Jeremiah Rosher, praying a declaration that he, as equitable mortgagee of the lease, was liable to the payment of the rent, and to the performance of the covenants, and that he was bound to accept, and that Marle was bound to execute to him, a legal assignment of the premises, by way of mortgage; and that such relief might be decreed accordingly. And that an account might be taken of the arrears of rent.

On the 7th February, 1837, William Rosher, without giving any notice to the plaintiffs, returned the lease to Marle, at the same time stating to Marle, by letter, that Messrs. Rosher claimed no interest in the premises, either as equitable mortgagees, or otherwise.

In March, 1837, Jeremiah Rosher filed his answer to the plaintiffs' bill, and from this answer they were informed, for the first time, that Jeremiah Rosher had ceased to have any interest in the partnership business of Jeremiah Rosher & Co., ever since March, 1830, although his name was retained in the firm; that since that period the business had been carried on by his sons, Henry, George, and Edward; that the lease had been deposited with William Rosher, as a security for a debt due to those individuals, and not the defendant; and that it had recently been returned to Marle, as before stated.

ROBINSON U. ROSHER.

The plaintiffs then amended their bill, by making Henry, George, and Edward Rosher defendants, and by adding to the prayer a clause in the alternative, viz. that if it should appear that the indenture of lease no longer remained in deposit for the benefit of Jeremiah, Henry, George, and Edward Rosher, or any of them, then that the defendants might be made answerable to the plaintiffs for the continued breach of the covenant to repair during the time they were equitable mortgagees.

In February, 1839, which was after issue joined in the amended suit, the case of *Moores* v. *Choat*, overruling the case of *Flight* v. *Bentley*, was decided, and a report of it was soon afterwards published by Mr. *Simons* (a).

In September and November, 1839, which was after the publication of Mr. Simons' report, the plaintiffs in the present cause entered into evidence.

The questions at the hearing were two:—First, whether the case of *Moores* v. *Choat* was rightly decided. Secondly, if it was, whether the plaintiffs were not entitled to the costs of this suit, notwithstanding they had entered into evidence since the publication of the report of *Moores* v. *Choat*.

Mr. Swanston and Mr. Lloyd, for the plaintiffs, said, that this case was similar in its circumstances to that of Flight v. Bentley (b), which was decided on the principles laid down by Lord Thurlow in Lucas v. Comerford (c). The

<sup>(</sup>a) See 8 Sim. 508. (b) 7 Sim. 149. (c) 3 Bro. C. C. 166; 1 Ves. jun. 235.

ROBINSON v.
ROSHRR.

authority of the latter case is expressly recognised by the Vice-Chancellor of England in Moores v. Choat, and it cannot be contended that between Flight v. Bentley and Lucas v. Comerford, there is any substantial difference. It follows, therefore, that Moores v. Choat cannot be supported. [The Vice-Chancellor.-A person in possession of leaseholds may so conduct himself as to preclude himself from saying to the landlord that he is not an assignee. Lucas v. Comerford may have been that case. If so, it would not afford authority for the broader ground taken in Flight v. Bentley.] There is nothing in the judgment of Lord Thurlow to shew that he decided on the ground of the defendant's possession. His decree is founded on the circumstance, that Comerford had an equitable assignment. Was that assignment constituted by the possession of rents and profits, or the deposit of the lease? The mere circumstance of the party being in possession of the rents and profits could give him no right, unless he had a specific lien upon them. His possession being independent of the landlord, he could not be considered a depositary of the lease by virtue of an equitable assignment. If so, and if Lord Thurlow's judgment does not proceed on that ground, it cannot be made a ground of distinction between the two cases. Neither is there any reason to suppose that Lord Thurlow's judgment was materially influenced by the submission of the defendant to perform some of the covenants in the lease. It is submitted, therefore, that the point must be decided on the principles upon which his Lordship did, in truth, proceed, namely, that a party having taken the benefit of a lease must be held bound by all the burdens of it.

Mr. Wood and Mr. James Parker, contrà, were stopped by the Court.

THE VICE-CHANCELLOR.—The question is, whether, when

an equitable interest has been acquired in leasehold property by a contract in the nature of an assignment, the landlord has a right, without more, to proceed in this Court against the assignee, as if he were his tenant. I am not aware of any principle of this Court which enables him to do this. In the present case, there is no circumstance either of conduct or contract, as between the owner of the fee and the party having the equitable interest in the lease, which could give the former a right to hold the latter liable to him in respect of the covenants in the lease. One may certainly imagine a case, in which a party having the equitable interest in a lease may so conduct himself as to raise an equity against him, as between himself and the landlord. But that is not so here. This view being taken by The Vice-Chancellor of England in a case very similar to the present, and my impression being in accordance with his, I am of opinion that the bill must be dismissed.

ROBINSON D.

The plaintiffs' counsel then contended, that, considering the state of the authorities when the bill was filed, it must be dismissed without costs. [The Vice-Chancellor.—The difficulty I feel is, that the plaintiffs have gone into evidence. Could they not have sustained an interlocutory motion to stay proceedings? There is a case in Cox (a), where, in the middle of the cause, Lord Thurlow dismissed the bill, without costs, on the application of the plaintiffs. And in Van Sandau v. Moore (b), Lord Eldon did not dispute the correctness of the decision.] Those cases stand almost alone. It must be admitted, however, that in Broughton v. Lashmer (c), where the bill was filed by an administrator, it not being known there was a will, and afterwards the will was found, Lord Cottenham dismissed the plaintiff's bill, on his application, without costs.

<sup>(</sup>a) Knox v. Brown, 1 Cox, 359; 2 Bro. C. C. 186.

<sup>(</sup>b) 1 Russ. 466.

<sup>(</sup>c) Not reported.

Rosinson s. Rosher.

For the defendants it was contended, that, even if Moores v. Choat had never been decided, the other cases did not authorize the plaintiffs to come into equity; for that, here, the depositaries had not, as in those cases, insisted on their rights as against the landlord, by refusing to deliver up the lease or otherwise; that, in fact, the lease was not in their possession when the bill was filed, and that the bill did not charge any application to have the lease delivered up, or pray any relief on that head. They also commented on the fact of the plaintiff having entered into evidence since the decision in Moores v. Choat.

THE VICE-CHANCELLOR.—As to the costs incurred before the decision in Moores v. Choat. I have not the least doubt in holding that each party must pay his own costs. The difficulty which I have felt is as to the costs of the suit incurred since, namely, the costs of taking the evidence: and I have been considering, whether the plaintiffs were not to blame in not making an application to the Court, with a view of saving expense by dismissing the bill: but upon the whole, considering that such an application is not of a usual nature—that the two decisions of Flight v. Bentley, and Moores v. Choat, were by the same Judge, and that the same point had not come before any other Judge, I have arrived at the conclusion that the plaintiffs were not sufficiently to blame to induce me to make any distinction as to the costs. Therefore, though not without some difficulty, I am of opinion, that the bill ought to be dismissed without costs.

Decree accordingly.

1841.

#### HOPKINSON v. BAGSTER.

THE bill was filed by the plaintiffs on behalf of them- Under the usual selves and all other the creditors of John Prosser, an army accoutrement maker, deceased, against William Bagster and Mary his wife, who was the daughter and administratrix of Prosser, and against John Prosser, his eldest son and heir-at-law. The bill prayed the usual accounts and the usual relief against the real and personal estate of the intestate.

The defendants, Bagster and wife, by their answer, admitted that assets had come to their hands, but to an amount by no means sufficient to pay the testator's debts. In one of the schedules to their answer, they professed to give an account of the personal estate of the intestate converted into money since the testator's death, and not come to their hands. This they stated to consist of a leasehold house and premises, No. 9, Charing Cross, (where the trade had been carried on), the lease of which had been deposited by the intestate with Messrs. Cocks & Co., bankers, as a collateral security for what remained due to them on the intestate's promissory note for £1000. These premises were stated in the schedule to have been sold and assigned by the defendants, the Bagsters, and Cocks & Co., to the defendant, John Prosser, for £250, which sum was paid over to Cocks & Co. in discharge of their debt. The defendants. Bagster and wife, declared their belief that £250 was the full value of that property. in another part of their answer, accounted for the stock, fixtures, and utensils of the trade, which was, after the intestate's decease, carried on by the defendant John Prosser.

No amendment was made to the bill in consequence of the above statement; but the cause came on for hearing and a decree was made, directing the Master to take the

Nov. 5th. decree in a creditors' suit, the Master allowed an interrogatory to be exhibited for the examination of the administratrix. which was in very special terms, containing inquiries not suggested by the pleadings, as to monies which she had not received. and why the same had not been received. The interrogatory was disallowed.

HOPKINSON 9.
BAGSTER.

usual accounts of the personalty, to sell the leaseholds, and to apply the personalty and the produce of the leaseholds in payment of the debts, in a course of administration; and in case that fund was insufficient for such purpose, then the Master was to inquire as to the real estates, &c.

Four interrogatories were exhibited in the Master's office by the plaintiffs for the examination of the defendants Bagster and wife; three of these were in the usual form: the fourth contained inquiries whether the intestate was not in his lifetime, and at the time of his decease, possessed of, or entitled to, a leasehold messuage, &c., No. 9, at Charing Cross? Whether he did not for many years carry, and up to his death carry, on the business of an army accoutrement maker on the same premises, and whether the defendant, John Prosser, had not since, or from some and what time, carried on the business on the same premises? Whether the defendants, Bagster and wife, had not sold and disposed of the same premises, with the good-will, to John Prosser; and whether they had not left in his hands the stock in trade of the intestate, and also the fixtures and utensils of trade, and of what value the same were? Also, whether the same defendants had ever, and when, received any and what sum or sums, from John Prosser, in respect thereof, and if not, why not? And whether John Prosser had not had the use and disposal of the same, or what had become thereof? And what had become of the intestate's plate and wines, and if sold, when, and to whom, &c., and what had become of the produce, and if not sold or disposed of, why not?

The Master having certified that he had allowed these interrogatories, an exception was taken to his certificate, alleging generally that he ought not to have allowed such interrogatories.

Mr. Cooper and Mr. Chapman Barber, for the exception, contended, that the Master had exceeded his functions

in allowing the fourth interrogatory, which went to charge the administratrix and her husband with what, but for their wilful default, they might have received. In support of this argument, and also as an authority for the general form in which the exception had been taken, they cited Moore v. Langford (a). HOPKINSON 9.
BAGSTER.

Mr. Spence and Mr. Campbell, contrà, upon the point of form, cited Cotham v. West (b), and Gompertz v. Best (c), contending that the former of these cases was at variance with Moore v. Langford. [The Vice-Chancellor said, that he thought the two cases might stand together, and added, after mentioning Pearson v. Knapp (d), Hoare v. Johnston (e), and Woods v. Woods (f), that he was disposed to follow Moore v. Langford, not only on the point of form, but on the other point.] As to the other point, this case differs from that where the Master is directed simply to take the accounts of an administrator. Here he was directed to see whether any part of the personal estate was insufficient before he proceeded to a sale of the real estate. It was therefore competent to him to put the interrogatory, more especially as an inquiry as to wilful default could not afterwards be had on further directions: Garland v. Littlewood (q). In Sidden v. Forster (h), it is laid down, that the Master has full authority, under the general direction in the decree, to examine a party on fresh interrogatories.

THE VICE-CHANCELLOR said, that, in his opinion, the Master, in allowing the fourth interrogatory, had, to a certain extent, exceeded his functions; and therefore the exception to that interrogatory must be allowed. His

- . (a) 6 Sim. 323.
  - (b) 1 Beav. 380.
  - (c) 1 Y. & C. 114.
  - (d) 1 Myl. & K. 312.
- (e) 4 Myl. & C. 127.
- (f) 9 Sim. 197.
- (g) 1 Beav. 527.
- (h) 1 S. & S. 335.

1841. HOPKINSON v. BAGSTER. Honor, however, did not think it incumbent on the Court to say in what particular respects the interrogatory was wrong; and he desired to have it understood, that, in his opinion, it was competent to the Master, if he thought fit, to allow further interrogatories for the examination of the defendants, which might contain some portion of the matter included in the fourth interrogatory.

Exception allowed.

Nov. 6th, 8th, 12th. Early in 1818.

cestui que trust,

with power of directing the variation of the trust securities, requested B., who was one of his trustees, to sell out trust stock then standing in the £5 per cents., and invest in the £3 per cents. In April

of the same year, the trus-

sold out the stock by power

of attorney,

tees, B. and H.,

### BROADHURST v. BALGUY.

THE object of the bill was to charge a trustee with the loss of the trust fund, occasioned by his co-trustee, under the following circumstances:—

On the marriage of the plaintiff, John Broadhurst, with Catherine Hurt, a sum of £3000 Navy £5 per cent. Annuities was transferred into the joint names of the defendants, Francis Hurt, the brother of Catherine Hurt, and Bryan Thomas Balguy; and by an indenture, dated the 1st of November, 1815, and made between the plaintiff of the first part, Catherine Hurt of the second part, and the defendants of the third part, being the marriage settlement, it was agreed that the said sum of stock, as also a sum of £17,000 Navy £5 per cent. Annuities, belong-

and soon after-wards H., at the request of B., joined in a cheque on the bankers who acted in the sale, requesting them to pay the amount to themselves or bearer. In the letter of B. requesting H. to sign the cheque, he stated, as a reason for expedition, that the money was to be paid on Thursday to the gentleman to whom it was engaged. B. afterwards applied the money to his own use. On a bill filed in 1838, by the cestui que trust, to compel H. to replace the money:—

Held, that H. was prima facie liable; for that neither of the trustees contemplated an investment pursuant to the direction of the plaintiff; and even if H. had so contemplated, the course taken by him was not required by necessity or convenience. But, inasmuch as it was proved that the plaintiff knew before 1820 that the stock had been sold out, and that he, in several subsequent successive years, received accounts from B., who was his agent and also his debtor, in which were contained entries for interest on stock appearing clearly to be the fund in question, which entries were irregular in amount and dates; and inasmuch as, notwithstanding these circumstances, no communication on the subject appeared to have been made from the plaintiff to H., who was his brother-in-law, from April, 1818, to November, 1837, which was shortly previous to B.'s bankruptcy, the Court directed inquiries to be made with a view to ascertain whether and when first the plaintiff had notice of the breach of trust.

ing to the plaintiff, should be held by the defendants, upon trust, that they and the survivor of them, &c., should permit the plaintiff and his assigns, from time to time, during the joint lives of himself and his intended wife, to receive and take the interest, dividends, and annual produce of the trust funds, for his and their own use and benefit; and, in case he should die in the lifetime of his intended wife, then in trust that they should permit her and her assigns to receive and take such interest, &c., during her life, for her and their own use and benefit; and, after the decease of the survivor of them, the said plaintiff and his intended wife, then upon trust that the said trustees, and the survivor of them, &c., should stand possessed of the said trust funds, in trust, in case there should be but one child of the marriage, for such one child, to be a vested interest in him or her, at such time as the plaintiff should by deed or will appoint, and, in default of such appointment, to be vested in him or her, at his or her age of twenty-one years; and, if there should be more than one child of the marriage, upon such trusts as in the said indenture were mentioned; and, it was thereby agreed and declared, that it should be lawful for the said trustees, and the survivors of them, his executors, administrators, and assigns, at any time or times after such intended marriage, with the consent and direction of the plaintiff and his intended wife, during their joint lives, and of the survivor of them, during his or her life, to be testified by some note or writing under their, his, or her hands. to sell, transfer, and dispose of all or any of the stocks or funds, which, for the time being, should be vested in them by virtue of the said indenture, upon any of the said trusts, and, with such consent and direction as aforesaid, to lay out and invest the principal monies to arise by such sale, transfer, or disposition, in the names or name of the said trustees, in the purchase of a competent share of the

BROADHURST v. BALGUY. BROADHURST 9. BALGUY. Parliamentary stocks or public funds of Great Britain, or upon Government or real securities in England, and should stand possessed of such new or other stocks, funds, and securities, upon the same trusts as had been declared of the original trust funds.

The marriage took effect, and the wife died in September, 1816, leaving one child only, namely, the defendant, John Broadhurst, junior, who attained his age of twenty-one on the 21st of August, 1837. The plaintiff, who was not provided for by the settlement in the event of his surviving his wife, took out administration to her effects, and thereby entitled himself, by implication, to a life interest in the £8000 stock.

It appears by the admissions in the cause, that the plaintiff received the dividends on the £3000 Navy £5 per Cents. to the year 1818. On the 5th of January, in that year, he sent a letter to Balguy, in these terms:—

"Dear Bryan,—Having determined to vest the money, now in the £5 per Cents. in the £3 per Cents., I could wish you and Hurt to execute a power of attorney immediately, so that the transfer may be effected before the dividends about to be paid are paid. In haste, ever yours,

"J. BROADHURST."

On the 12th April, 1818, Hurt and Balguy executed a power of attorney for the sale of the £3000 stock, and on the 14th of that month Balguy wrote a letter to his bankers, Messrs. Samuel Smith & Co., of Derby, directing them to sell out the stock. On the 18th of that month, Smith & Co. informed Balguy, by letter, that they had sold out the stock, producing 32161. 15s. 3d. sterling, and they requested Balguy to furnish them with an order from Mr. Hurt as well as himself, when he wished the amount to be disposed of.

On the 20th April, 1818, Balguy wrote to Hurt as follows:—

"My dear Sir,—The stock which stood in our names in the Navy £5 per Cents. has been sold out, and produced the sum of which I have drawn the cheque on the other side. The broker's certificate is in my possession, from which I find Messrs. Smiths' account to be correct. Be good enough to sign the cheque, and return it to me at your earliest convenience, as the money is to be paid on Thursday to the gentleman to whom it is engaged. I am, &c., "B. T. Balgur."

BROADHURST v.
BALGUY.

On the day following the date of this letter, Hurt and Balguy drew a cheque upon Samuel Smith & Co., in the following form:—

"Messrs. Samuel Smith & Co., bankers, Derby,—Pay to ourselves, or bearer, Three thousand two hundred and sixteen pounds fifteen shillings and three pence, being the produce arising from the sale of stock (after deducting bankers' and broker's commission and postages) lately standing in our names in the Navy £5 per Cents.

"FRANCIS HURT. B. T BALGUY."

This cheque was afterwards delivered by Balguy, or his agents, to Smith & Co., who afterwards paid the before-mentioned sum of 32161. 15s. 3d. to or on account of Balguy, by virtue of four cheques or orders, dated, respectively, the 21st, 23rd, 25th, and 30th April, 1818. The last order, which was for £700, contained a direction to the bankers to place part of it, namely, £500, to the account of the plaintiff with Messrs. Smith, Payne & Smith of London.

It appeared that Balguy was the friend and professional adviser, and the agent and receiver of rents, of the plaintiff, and transacted business for many years, not only on the plaintiff's own account, but also for the plaintiff, as committee of his brother, who was a lunatic. In the course of these transactions accounts were rendered by Balguy to the plaintiff at the following times, namely, Account A., in June, 1820; Account B., in February, 1822;

BROADHURST v.
BALGUY.

Account C., in March, 1829; and Account D., in January, 1832. These accounts, soon after they had been received by the plaintiff, were returned by him to Balguy. The following items appeared in different parts of the accounts:—

| In Accoun     | t <b>A.</b> ,                            |     |     |   | £   | 8. | ,  |
|---------------|--|-----|-----|---|-----|----|----|
|               | m 1 10 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 | 3   |     | _ | £   | 5. | a. |
| 1819—May 10.  | To half a year's interest on £3200 ]     | 100 | luc | e | 80  | 0  | o  |
|               | of stock sold out on the 20th April      |     |     |   |     |    | -  |
|               | To ditto, due 20th Sept                  |     |     | • | 80  | -  | 0  |
| 1820—May      | To half a year's interest on stock       | •   |     |   | 80  | 0  | 0  |
| In Accoun     | t B.,                                    |     |     |   |     |    |    |
| 1820—Dec.     | Half a year's interest on stock          |     |     |   | 80  | 0  | 0  |
|               | One year's interest on stock .           |     |     |   | 160 | 0  | 0  |
|               | To one year's interest on stock          |     |     |   | 160 | 0  | 0  |
| 1823—Dec.     |  |     |     |   | 160 | 0  | 0  |
| 1824—Dec. 31. | To one year's interest on stock          | •   |     |   | 128 | 0  | 0  |
| 1825—Dec. 31. | To ditto, a year's interest on stock     |     | •   |   | 128 | 0  | 0  |
| In Accour     | at C.,                                   |     |     |   |     |    |    |
| 1826—Dec. 31. | To interest on stock                     | •   |     |   | 128 | 0  | 0  |
| 1828-Feb. 10. | To cash, a year's interest on stock      |     | •   |   | 128 | 0  | 0  |
| 1829—Feb.     | To one year's interest on stock          | •   |     | • | 128 | 0  | 0, |
| In Accour     | nt D.,                                   |     |     |   |     |    | •  |
| 1828—Dec. 25  | . To one year's interest on stock        |     |     |   | 128 | 0  | 0  |
| 1829—Dec. 26  | To dividends now due                     |     |     |   | 128 | 0  | 0  |
| 1830-Dec.     | To dividends now due                     |     |     |   | 128 | 0  | 0  |
|               |  |     |     |   |     |    |    |

In April, 1828, the plaintiff sent a letter to Balguy, in which, after stating that he was in want of money, and complaining of some alleged inaccuracies in the accounts, he used the following expressions:—"A farm of 60 acres, of Lord Chesterfield, at Baylstone; has been offered me. It would be a pity not to lay this to the estate if it can be bought with the money; and I should suppose you and Mr. Hurt would not object to part of my wife's fortune, or the whole, if necessary, being invested in the purchase. Is there no money whatever remaining of funded property in Mr. Hurt's hands?"

In answer to this letter Balguy wrote a letter, dated the 28th April, 1828, which contained the following passage:-"It will certainly be very desirable to purchase the farm at Baylstone, and I have no doubt Mr. Hurt will consent to the money being lent you, but as it is now out on mortgage, I think he will expect to have the same security; but on this point I will write to you as soon as you have determined any thing in regard to the purchase. I am not aware that there is a shilling trust money, indeed, if there had, I should apprehend there would have been no occasion to borrow any part of Mrs. Edgeworth's fortune, which you did upon a former occasion. If Mrs. Edgeworth has other money which she could let you have, would it not be better that the farm should be purchased with what will ultimately be yours; in which case it might be conveyed to the same uses to which the estates adjoining are liable under your father's will, rather than to purchase it with your trust monies, which, if not sufficient for the purpose, will create some difficulty?"

In the year 1880 the plaintiff ceased to employ Balguy in any capacity, and from that time all intercourse between them ceased.

In January, 1838, Balguy became bankrupt; and on the 31st of that month the present bill was filed, for the purpose of compelling Hurt to replace so much stock in the £3 per Cents. as could have been purchased with 32161. 15s. 3d. on the 22nd April, 1818; the bill alleging, that the plaintiff had no suspicion that the proceeds of the stock had not been invested in the £3 per cent. Bank Annuities until on or about the 21st August, 1837, when his son came of age, and it became necessary to enter into some family arrangements.

The principal ground of defence on the part of Hurt was, that the plaintiff must have known that Balguy had not invested the money pursuant to his directions, and that he must have tacitly assented to Balguy's borrowing the money

BROADHURST v. BALGUY.

BROADHURST v. BALGUY. for his own purposes. No express evidence, however, was adduced on this head, and Balguy, not having obtained his certificate at the time of taking the evidence, was not examined.

Mr. Wilcock and Mr. Prenderyast, for the plaintiff.—By signing the joint cheque of the 21st April, 1818, Hurt put out of his power that fund which had been committed to the joint care of him and Balguy, and in so doing committed a plain breach of trust. But it will be said, that, in the accounts rendered by Balguy to the plaintiff, there was that which ought to have put the plaintiff on inquiry, more especially as Balguy was the plaintiff's agent. counts were not the only communications between the parties, for there is a letter of Balguy's, in which he expressly states the money to be out on mortgage. But, judging from the accounts, the plaintiff appears to have been a creditor of Balguy, to the extent of about £2000, when Balguy drew the cheque. If Balguy had been a mere trustee, and it were shewn that he was peculiarly pressed for money at that time, or in a situation to require accommodation, there might be some ground for suspecting that the plaintiff had made some arrangement for the abuse of the trust fund, in order to get payment of his debts. But, instead of that, Balguy pays his other debts with the money. Besides, the entries in the accounts are calculated to mislead, and not to inform the plaintiff. The first entry of interest is in May, 1819, instead of 20th September, 1818, and relates to stock apparently sold out in April, 1812. Again, both that and the other items are calculated at £5 per cent., instead of £3 per cent.; they are mixed up with a great variety of other items in accounts relating principally to the estate of the lunatic; they are inserted at different periods in different years, so that Balguy gets several months' interest, and in 1827 no entries whatever are made. Can it be said, under these circumstances, that the plaintiff knew of the misappropriation? If Hurt is not chargeable, it must be either that the plaintiff knew every thing, or that he did something. Adams v. Clifton (a). All that he did was to give the authority of the 5th January. If any agreement to lend the money could be implied, Hurt would not be responsible. But that was the only license given before the sale of the stock, either to Balguy or to Hurt.

1841. BROADHURST BALGUY.

Mr. James Russell and Mr. G. L. Russell, for John Broadhurst, the younger.

Mr. Cooper and Mr. Wigram, for the defendant Hurt.— It appears that Balguy was the solicitor, agent, land steward, receiver, and confidential friend of the plaintiff; and the confidence placed in him has been abused. The plaintiff, finding it has been abused, resorts to the course of coming against an innocent party, who was admitted to be ignorant of all the transactions, and whose only fault is, that he has placed the same reliance on Balguy that the plaintiff has for twenty years. The defendant Hurt may, no doubt, be compelled to make good this loss; but if so, it must be by the rules of this Court, which, though sometimes useful, would be in this case most oppressively applied. The general rule is not disputed, that where there are several trustees, and the fund is permitted to go into the hands of one for the purpose of re-investment, the others are bound to ascertain that the re-investment has taken place, and, if they omit to do so, they may be made liable for the acts of their co-trustee. Brice v. Stokes (b) contains the principle, and Booth v. Booth (c) collects the authorities on this head. But those cases also contain the qualification of the general doctrine, namely, that no cestui que trust, who is acquainted with the misapplication, and lies by for years without taking steps against the

<sup>(</sup>a) 1 Russ. 297. (b) 11 Ves. 319.

<sup>(</sup>c) 1 Beav. 125; and see Moses v. Levi, 3 Y. & C. 359.

BROADHURST v.
BALGUY.

party, is entitled to the benefit of the rule. That qualification must be applied here. But the circumstances of this case authorize a still further qualification. This is not the case of an express trust, or of a bill for a legacy, for which it may be admitted that the bill may be brought after nineteen years; but it is a case of a mere personal claim against one trustee for the default of the other; and in such case it is submitted, that the doctrine of laches applies. The two points therefore to be considered are those of acquiescence and laches.

First, as to acquiescence. The bill contains a statement, that the plaintiff believed the dividends were the dividends of stock produced by the sale of the £3000, Navy £5 per Cents. But it is impossible he could have thought that. He was of mature age, and well acquainted with business. Why should he conceive that the dividends in Consols would be greater than the dividends of £5 per Cents.? The only authority he gave was to invest in Consols. He appears to have received £160 to the end of 1823, and afterwards £128; and the bill alleges, that he believed that the £128 was either dividends of the Navy £5 per Cents., or the converted stock; but, in 1824, what public fund produced £4 per cent? It is impossible to come to any other conclusion than that the plaintiff permitted Balguy to hold the money. giving him interest. It is not necessary to represent to the Court, that an express agreement took place for this purpose. If the plaintiff was apprized of the fact, that Balguy was retaining the money, that is acquiescence: Walker v. Symonds (a). And it is not too much to infer, that he was apprized of that fact, when it is considered that he always examined the accounts. That any of the items of stock in these accounts belonged to the lunatic's estate, there is no evidence whatever.

With respect to the point of laches, the cases of Walmesley

<sup>(</sup>a) 3 Swanst. 64.

v. Booth (a), Hercy v. Dimooody (b), and Smith v. Clay (c). are applicable. It is also to be remarked, that, in cases of this nature, a cestui que trust has a duty to perform as well as the trustee. He ought to ascertain the state of the fund, and do all he can to protect it, by giving notice to the trustees of any suspicious circumstances which may arise respecting it. But that duty has been neglected in this case, and the plaintiff is therefore barred. For it is clear, that if, by the neglect of the plaintiff, the relief against any of the parties is prejudiced, the remedy against the others is destroyed. Pooley v. Ray (d), Pickering v. Lord Stamford (e), Earl of Egremont v. Hamilton (f), Gray v. Chaplin (g), Styles v. Guy (h).

BROADHURST 9. BALGUY.

Mr. Wilcock, in reply.

THE VICE-CHANCELLOR—The question to be decided in this cause is, whether the defendant, Mr. Hurt, has committed a breach of trust as to a sum of £8000 Navy £5 per Cent. Stock, or the money produced by the sale of it, in respect of which he is liable to the extent of the interest of the plaintiff as a cestus que trust of that property.

The stock in question belonged to Miss Catherine Hurt, and, on her marriage with the plaintiff in 1815, was vested in her brother, the defendant, Mr. Hurt, a gentleman of property in Derbyshire, and the defendant, Mr. Balguy, a solicitor, as trustees, upon trusts declared by a settlement dated the 1st of November in that year. The trusts were to permit, &c. [His Honor then read the limitations in the settlement, and the power to vary the securities.]

There is one child of the marriage, the defendant, Mr. Broadhurst, junior. He attained his majority in the year

- (a) 2 Atk. 25.
- (b) 4 Bro. C. C. 257.
- (c) 3 Bro. C. C. 639.
- (d) 1 P. W. 355.
- (e) 2 Ves. jun. 583.
- (f) 1 Ball & B. 516.
- (g) 2 Russ. 146.
- (h) In Excheq., cor. Lyndh. C.B.

Nov. 12th.

1841.
BROADHURST

1837. Mrs. Broadhurst died in the year 1816. The plaintiff appears to have become her administrator in September, 1831, and not before. His beneficial title, in her right or under the settlement, to the income of the trust fund for his life appears never to have been questioned. The dividends, up to the month of January, 1818, inclusive, were paid to him through his then bankers, Messrs. Smith & Co., of Derby. In that month the plaintiff wrote to Mr. Balguv. who was his professional adviser, and on terms of intimacy with him, this letter :-- "Dear Bryan,--Having determined to vest the money, now in the £5 per Cents., in £3 per Cents., I could wish you and Hurt to execute a power of attorney immediately, so that the transfer may be effected before the dividends about to be paid are paid." It is not contested that the stock here mentioned was the £3000 in question.

Under a power of attorney dated the 12th April, 1818, and in consequence of a letter from Mr. Balguy to the Derby bankers, the stock was sold on the 17th April, 1818, and produced the net sum of 32161. 15s. 3d., which was received by their London agents on their behalf. The letter from Mr. Balguy was thus—[His Honor read the letter of the 14th April, 1818].

[His Honor then read the letter of the Derby bankers of the 18th April, 1818, and Balguy's letter to Hurt of the 20th April, 1818, and proceeded thus:] For the statement at the conclusion of this document, (i. e. Balguy's letter), as to the engagement of the money, it does not appear that there was any foundation in fact, nor, except the plaintiff's letter of January, does there appear to have been any direction or authority on his part for selling the stock. A cheque, however, for the money is signed as well by Mr. Hurt as by Mr. Balguy; it is dated the 21st of April, 1818, and is to this effect, &c. This cheque was, in the language of the admissions, "afterwards delivered by Mr. Balguy," or some agent of his, to the Derby bankers,

who, (in the language also of the admissions), "afterwards paid the said sum of 32161. 15s. 3d. to or on account of the said B. T. Balguy, upon or by virtue of several cheques or orders drawn by him." [His Honor read the cheques and orders, and the corresponding entries in the bankers' cash note ledger.]

BROADHURST.
6.
BALGUY.

It is not at present proved, that the plaintiff was aware that the £500 placed to his credit by Mr. Balguy, with whom he had a running account, came from this source, or was aware of the mode in which any part of the proceeds of the stock was applied. The whole of the money, or the whole except the £500, appears to have been thus applied for Mr. Balguy's own purposes.

That, under these circumstances, there not having been any intention on the part of either trustee to invest the money in £3 per Cents., (the fund mentioned in the letter of January), and there not having been any other investment or security, in fact, obtained or agreed upon, a breach of trust was committed by Mr. Hurt in placing, as he did, the trust fund out of the joint control of himself and Mr. Balguy, and in the sole power of the latter, without any necessity or sufficient reason, cannot, I think, be doubted; and the money having been used by Mr. Balguy as already mentioned, and having been lost by his bankruptcy, it is, I conceive, plain, that, supposing there to be nothing more in the case, Mr. Hurt must in this cause be charged with the whole. I have not excepted the £500, because, so far as at present appears, it was received by the plaintiff as a general cash remittance from Mr. Balguy, his agent, without any reference to the trust property; and it is admitted that the state of the accounts between them up to the 80th of April, 1818, inclusive, was such, that, if a balance had been struck at the close of that day, a large sum, (more, namely, than £1000), would have been found due from Mr. Balguy to the plaintiff.

Had Mr. Hurt executed the power of attorney and

BROADHURST v.
BALGUY.

signed the joint cheque with the view and for the purpose of effecting an investment conformably to the trust, that investment having been actually fixed upon, and the due completion of the transaction requiring only the transmission of the money, the case might have been different. But here, as I have said, neither trustee appears to have contemplated an investment in stock: and had the case been otherwise, the course taken by Mr. Hurt was not required by necessity or convenience for that purpose. The security suggested by Mr. Balguy. in his letter to Mr. Hurt, having been imaginary and fictitious, the deceit so practised upon him does not form a justification for him as between him and the cestui que trust; nor can it be forgotten that Mr. Hurt does not appear, after signing the joint cheque, to have made any inquiry or endeavour for the purpose of ascertaining what had been done with the money.

The case of Hanbury v. Kirkland (a), before Sir Lancelot Shadwell, in 1829, involved a point in some degree similar to the present, and was, I think, rightly decided by that learned Judge against the trustee. The prior cases, however, of Brice v. Stokes (b), Langford v. Gascoigne (c), Lord Shipbrook v. Lord Hinchinbrook (d), and Underwood v. Stevens (e), had settled the law on the subject; to which may be added Clough v. Bond (f), before Lord Cottenham.

Has, then, Mr. Hurt's liability been removed as between him and the plaintiff by any other circumstances? That is the point of difficulty, as it seems to me, in the case. If Mr. Hurt has an answer to Mr. Broadhurst, the father, he has an answer to this suit; and, upon plain principles of justice, principles recognised by the authorities, to some of which I have referred, it is an answer to him, if, know-

<sup>(</sup>a) 3 Sim. 265.

<sup>(</sup>b) 11 Ves. 319.

<sup>(</sup>c) Id. 333.

<sup>(</sup>d) Id. 252; 16 Ves. 477.

<sup>(</sup>e) 1 Mer. 712.

<sup>(</sup>f) 3 Myl. & Cr. 490.

ing that the stock was sold, that Mr. Balguy had acquired the sole possession of the proceeds, and that they had not been invested conformably to the trust, Mr. Broadhurst acquiesced in that state of things, and dealt with Mr. Balguy alone, for a series of years, as his debtor, without any reference to Mr. Hurt, and without giving any notice, or making any complaint or communication to him on the subject.

BROADHURST v.
BALGUY.

This is the case which, in substance, the latter has set up, and with reference to which a portion of the evidence in the cause has been adduced. Before referring to that portion of the evidence, I may notice that, in 1829, or 1830, all connexion and communication between the plaintiff and Mr. Balguy appear to have ceased; that no income in respect of the trust fund appears to have been paid or credited to the plaintiff after 1830, and that there is not any trace of any application or communication to his brother-in-law, Mr. Hurt, on the subject, between the 20th of April, 1818, and the 4th of November, 1837, the bill not having been filed before 1838.

Upon this evidence, as it stands, if it were full and satisfactory, or if there were not any reasonable prospect of adding usefully to it, it would be the duty of the Court now to decide this case in the best manner within its power. But if, as I think, the evidence is not at present full and entirely satisfactory, and if, as I also think, there is a reasonable prospect of adding materially to it, it is then incumbent on the Court to direct further inquiry.

One point is, in my opinion, clearly established now, namely, that before the year 1821 the plaintiff was aware that the stock had been sold. He had, in January, 1818, by the letter of that date, directed or expressed a wish for the sale. That letter is not suggested to have been countermanded. The Account A., which was in his possession before 1821, has been admitted on all hands, by the £3200 mentioned in it, to have meant the stock in question or the

BROADHURST 6.
BALGUY.

produce of its conversion, and, notwithstanding the erroneous date of 20th April, 1812, I am perfectly satisfied that the plaintiff was, in the year 1820, well aware that such was the meaning. It has not been attempted to be shewn that there was any other fund to which the entry, containing that date, or the other entries connected with it in the Account A., could have applied, or could have been considered by the plaintiff as applying. The dividends on the stock had, up to January, 1818, inclusive, been received by his bankers on his account, either from the trustees, or under their authority. But he has no subsequent credit with Messrs, Smith & Co. for any dividend, although they continued his bankers up to May, 1819; to which the remark may be added, that his bill is amended more than eleven months after it was filed, and, as it now stands, contains an allegation that the plaintiff had not any suspicion that the proceeds of the stock had not been invested in £8 per Cents. until on or about the 21st August, 1837, when he discovered that fact, and a charge that it was in pursuance of the letter of the 5th January that the trustees procured the stock to be sold.

Now, taking it as proved, that the plaintiff knew in the year 1820 that the stock had been sold, it must be considered that he was also perfectly well aware at the respective times of the deliveries of the Accounts A., B. and C., in June, 1820, February, 1822, December, 1825, and March, 1829, that the various entries of £80, £160, and £128, for interest on the produce of stock or on stock, referred to the fund in question. These entries were as irregular in amount as they were in date, except, of course, as £160 was the amount of a year's interest at £5 per cent. on £3200. But the trust fund was £3000 £5 per cents. The first reduction of that stock was in 1822, when the trust fund would, in the regular course, if unsold, have been changed into £3000 sterling, or £3150 £4 per Cents., which latter sum would, in 1824, have been converted into

a similar sum of 31 per Cents. The Account C., rendered in March, 1829, contains three entries of £128 each, for interest on stock, although in April, 1828, Balguy, in a letter to the plaintiff, with reference to the trust fund, expressed himself thus:--"I have no doubt Mr. Hurt will consent to the money being lent you; but as it is now out on mortgage, I think he will expect to have the same security." What, if any, answer to this, or observation upon this was made by the plaintiff does not appear, although, it being his case in the suit that he had never authorized any mortgage, he makes in the bill the allegation respecting the discovery of August, 1837, which I have just noticed. Adding to these circumstances the fact, that the plaintiff appears not to have been in great affluence, and that, from the year 1817 to the year 1830, Balguy was his professional adviser and agent, and on terms of intimacy with him, I find myself unable at present to believe that the Court is in possession of all that has passed, whether orally or in writing, between them on the subject under consideration. I think that more, materially more, must have passed. I think that there not having been a cross bill, and Balguy, who has, I am informed, obtained his certificate, not having been examined by either party as a witness, a reasonable probability exists of arriving at the knowledge, to some extent at least, of what did pass; and I have therefore concluded it to be my duty to pause, and not decide this case on the materials, neither abundant nor satisfactory, which the cause, as to this part of it, now contains, without exhausting such means of obtaining farther light as the powers of the Court afford. I may ultimately be under the necessity of deciding without additional materials. In that case I will address myself to the duty as I best may; but at present I am satisfied that the course most fit to be taken by me is to direct further inquiry.

Much has been ably said in the argument upon the

BROADHURST 8. BALGUY. BROADHURST U. BALGUY. subject of time. This is a case in which the length of time that elapsed between the period when the demand arose, and the institution of the suit, does not form any positive bar. Great effect may be justly due to it as a circumstance in the case. What effect, if any, may be due to it, I shall be better able to judge when the inquiries directed shall have been answered by the Master. The points of acquiescence and laches will be fully open on further directions.

Refer it to the Master to inquire, &c., when first the plaintiff knew or had notice that the stock was sold; when first he knew or had notice that the proceeds of the sale, or any and what part of them, had not been invested conformably to the trust; and when first he knew or had notice that those proceeds, or any and what parts of them, were in the hands, possession, or power of Balguy solely; and whether the plaintiff ever, and when, consented or agreed thereto. Let the Master state all dealings and transactions, subsequent to the year 1817, that have taken place between the plaintiff and Balguy concerning or comprising or having reference to the trust fund or its produce, &c. Let the Master inquire whether Balguy has obtained his certificate, &c.; and, if it shall appear that it has been obtained and allowed, let the plaintiff and the defendant Hurt respectively he at liberty to examine Balguy as a witness upon the reference, in the same manner as if Balguy had not been a party to the cause, &c. Liberty to state special circumstances, &c. Liberty to apply, &c.

## CONNOP v. HAYWARD.

THE bill was filed by the plaintiff against the defendant, Sarah Hayward, as the executrix of the will of James Hayward, deceased, her late husband, praying payment to the plaintiff of a legacy of £50 bequeathed to him by the by her answer, testator.

The defendant, by her answer, averred as follows:—"And this defendant further saith, she admits it to be true that she hath possessed herself of the personal estate and effects paid the legacy: of the said testator, to a considerable amount, and much the plaintiff had more than sufficient, to answer and satisfy all the said testator's just debts and funeral and testamentary expenses. and the legacies given by his said will\*; and she, the said mitted assets, defendant, hath thereout paid all the said testator's debts, and funeral and testamentary expenses, and the several legacies given and bequeathed by the said testator's will, including therein the said legacy of £50 bequeathed to the by the answer said complainant, and which said legacy this defendant denies that she hath wholly neglected or refused to pay, inasmuch as this defendant submits, that, under the circumstances herein mentioned, she has fully paid and satisfied the full amount of the said legacy." The defendant then stated, that the testator died seised in fee of certain freehold messuages and lands at Pembridge, in the county of Hereford, which he devised to the defendant for life, with remainder to the plaintiff, who was her nephew, in That at the death of the testator there was a mortgage of £50 on the premises, with an arrear of interest, and that the messuages were much out of repair. was agreed between the plaintiff and defendant that the mortgage should be paid off, and the premises repaired, and that the plaintiff's legacy of £50 should be applied in part payment of those expenses. That this was accordingly done; the residue of the expenses amounting to between £400 and £500 being paid by the defendant. That

1841.

Nov. 8th. On a bill filed against an executrix for payment of a legacy, the defendant. admitted assets. but insisted, that, under the circumstances stated in her answer, she had -Held, that a right to read the passage of the answer in which she adwithout reading the passage as to payment of the legacy.

Where matters are stated which are not put in evidence, it is in the discretion of the Court to direct inquiries as to these matters before the Master.

A settled account, suggested by the answer, but not proved, is usually the subject of inquiry.

10 Jur. 687

VOL. 1.

CONNOP

7.

HAYWARD

for some years after the death of the testator, which took place in 1818, the defendant had maintained him at her own expense; that she had also assisted him in stocking a farm, and had relieved him of difficulties by loans of money since the occupation of the farm, and that, on the farming account, there was due to her upwards of £92; and under these circumstances, she insisted on a set-off against any claims to be made upon her by the plaintiff.

At the hearing of the cause, Mr. Cooper and Mr. Rolt for the plaintiff, in order to shew the defendant's admission of assets, read the passage in the answer above transcribed as far as the asterisk.

Mr. Romilly, for the defendant, contended, that the plaintiff's counsel were bound to read the remainder of the passage; it being connected with the former part, and amounting to an averment, that the legacy was paid under the circumstances specially mentioned.

THE VICE-CHANCELLOR.—I think that there is not such a connection between the passages as to render it necessary to read the latter with the former. The passage which has been read only relates to the *amount* of the assets. It shews the property to be enough. The *mode* in which the property has been distributed is a totally distinct question.

The plaintiff's counsel then submitted that the plaintiff was entitled to an immediate decree for payment of the legacy.

Mr. Romilly insisted that, under the circumstances stated in the answer, though there was no evidence, he was entitled to resist payment in the first instance and to have an inquiry before the Master. [The Vice-Chancellor.—If an inquiry is directed, it must be ascertained whether the mortgage was the testator's debt or not. If it was the testator's debt the plaintiff would have a right to have it

paid out of the testator's personal estate. Looking at the answer, can I direct immediate payment without a reference?]

CONNOP

U.

HAYWARD.

Mr. Cooper, in reply.—The course as to inquiries has generally been this—that if the plaintiff does not, by his bill, put in issue a matter insisted on in the answer, there an inquiry will be directed; but if the bill, with a view of obtaining an immediate decree, puts facts in issue, as to which the defendant might enter into evidence at the hearing, then an inquiry will not be directed. Hence it has been usual, when matter is suggested by the answer, to amend the bill by putting that matter in issue, so as to compel the defendant to establish his statement by evidence.

THE VICE-CHANCELLOB, after asking whether the defendant was willing to pay the money into Court, and receiving an answer in the affirmative, said:—it must be to a certain extent in the discretion of the Court whether matter suggested by a defendant in his answer is a fit subject for inquiry or not. There is no universal rule on the point. Suppose a settled account, suggested by the answer, but not proved; I believe it has been always the rule to let the case go before the Master under such circumstances, with a direction not to disturb a settled account, if he should find any, but with liberty to surcharge and falsify. In the present case I think it not right to refuse the opportunity to the defendant of making out her case if she can; subject, of course, to the peril of costs, if proved wrong, and subject to paying the money into Court. If her statement is true, it would be monstrous to make her pay the money.

Upon the defendant bringing the money into Court, let the Master take an account of what is due for principal and interest in respect of the legacy, and let him state whether the legacy and interest, or either, and which of them, have or has, wholly or partially, to any and what extent, been, in any and what manner, paid or satisfied; with liberty to state special circumstances.

1841.

Nov. 11th, 12th, 16th.

By an indenture, dated in April, 1810, an annuity was granted to S., charged upon real estate, and by an indenture dated in April, 1820, the same property was charged by the same parties with an annuity payable to A. This annuity was void for want of a proper memorial, but until the filing of the bill it had been always treated as a valid anmuity, and in September, 1821, A., under a proviso in his annuity deed, entered into possession and receipt of the rents and profits of the estate, and remained in undisturbed possession of them till his death in 1829,

## SEABLE V. COLT.

BY indentures of lease and release dated respectively the 8th and 9th of March, 1804, being the settlement made upon the marriage of Edward Vaughan Colt and Frances Martha, his wife, certain freehold hereditaments at Bushbury, in the county of Stafford, were conveyed to Sir John Dutton Colt and John Sayer, and their heirs, upon trust, during the life of Mrs. Colt, to pay the yearly rents and profits thereof to such person or persons, and to and for such uses, intents, and purposes, in such shares and proportions, and subject to such provisoes and agreements as Mrs. Colt, notwithstanding her coverture, should by any note or writing under her hand direct, and for want of such direction, to pay the same to Mrs. Colt to her separate use. The deed contained no clause against anticipation.

The premises comprised in this settlement were subject to a term of 500 years, created by an indenture of mortgage, bearing date the 27th June, 1749, which term afterwards became vested in Richard Smith, to secure the repayment to him of £400, which had been advanced by him at the request of Mr. and Mrs. Colt, to pay off a prior mortgagee.

when his personal representative took possession. In 1835, S. died, and in November, 1839, his personal representative filed his bill to set aside A.'s annuity and to establish his own. The bill alleged that S. had received payment of his annuity down to October, 1820, and that A. had obtained possession of the premises under misrepresentation. These allegations, however, were not proved against A., nor was it proved that he ever had notice of S.'s title, but the allegation of payment was admitted by the grantors of the annuity, who were co-defendants with A. in the suit. Under these circumstances, and considering that S. had never been in possession of the property:—Held, 1st. That, notwithstanding the infirmity of A.'s title, the plaintiff was not entitled to the relief prayed by his bill. 2ndly. That he was not, in consequence of the admissions of A.'s co-defendants, entitled to any inquiry as against A., with a view to obviate the effect of delay in filing the bill. 3rdly. That his bill must be dismissed with costs as against A., on the ground of length of time.

Courts of equity will give effect to the penal clauses of the Annuity Acts, not merely in questions between the grantor and the annuitant, but in those between prior and subsequent annuitants. The construction of the stat. 3 & 4 Will. 4, c. 27, discussed with reference to the right of the grantee of an annuity charged on land to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, punctual payment of the annuity, and no acknowledgment in writing of the grantee's title.

By an indenture bearing date the 18th April, 1810, and made between Mr. and Mrs. Colt of the first part, Andrew Searle of the second part, and James Thorpe of the third part, reciting the settlement, and that Mrs. Colt had contracted with Searle for the sale to him of an annuity of £122 for her life, at £793, and had agreed to charge such annuity on the premises, it was witnessed, that, for the considerations aforesaid, Mr. and Mrs. Colt granted and confirmed an annuity of £122, to be charged upon and issuing out of the said premises, to Searle, his executors, administrators, and assigns, during the life of Mrs. Colt; and for securing the annuity, Mr. and Mrs. Colt by the same deed demised, and Mrs. Colt, by virtue of the power given to her by the settlement, appointed the premises to James Thorpe, his executors, &c., for 99 years, if Mrs. Colt should so long live. The deed contained the usual powers of distress and entry on the annuity being in arrear twenty one days, a covenant by Mr. Colt with Searle, for due payment of the annuity, and power to the vendors to repurchase.

A memorial of this annuity was duly enrolled, pursuant to the Act of Parliament.

Some years after this transaction, Mr. and Mrs. Colt agreed with Thomas Abraham to grant him an annuity for £160 for their joint lives, and £218 for the life of the survivor, to be charged upon the same premises, and also upon certain leasehold lands of Mrs. Colt at Dilwin in Herefordshire. The consideration for these annuities was to be £1600, out of which the sums of £400, and 631.6s.2d. interest were to be paid to Richard Smith, in whom the term of 1749 was vested, and who was thereupon to assign that term to a trustee for Abraham.

This agreement with Abraham was carried into execution by means of certain indentures dated the 20th of April, 1820. By one of these instruments, reciting the agreement, and that Abraham had by the direction of the

SEARLE O. COLT.

SEARLE V. COLT. Colts, paid to Richard Smith 4631. 6s. 2d. in discharge of all principal and interest due on his security, it was witnessed, that, in pursuance of the agreement, and in consideration of the sum of 4631. 6s. 2d. so paid to Smith, and of 11361. 13s. 10d. paid to Colt, such two sums making together £1600, the consideration money for the purchase of the said annuities, Mr. and Mrs. Colt thereby granted to Abraham, his executors, &c., the said annuities for the respective times before mentioned, charged upon and issuing out of the premises comprised in the settlement, and also the premises at Dilwin; and they also demised to Hoggins, his executors, &c., for the term of 99 years, all the aforesaid premises in trust, to secure due payment of the said annuities.

The indenture of even date with the last-mentioned indenture, was made between Richard Smith of the first part, Mr. and Mrs. Colt of the second part, and Thomas Bevan of the third part, and thereby, after reciting Smith's mortgage and the agreement for the sale of the annuities to Abraham, Smith, by the direction of Mr. and Mrs. Colt, assigned the mortgaged premises to Bevan, upon trust, for better securing the said annuities, and subject thereto, upon trust, for securing to Mr. and Mrs. Colt the repayment of the said sum of £400 so paid to Smith, and subject thereto to attend the inheritance.

In the month of September, 1821, if not at an earlier period, Thomas Abraham entered into possession of the rents and profits of all the premises, and remained in undisturbed possession of them until his death, which happened in 1829, whereupon his administrator, Robert Abraham, entered into possession, and was so at the filing of the present bill.

In 1835, Andrew Searle died intestate, and thereupon letters of administration of his personal effects were granted to Charles Edward Searle.

John Sayer, the co-trustee with Sir John D. Colt, of the

marriage settlement of Mr. and Mrs. Colt, died many years since.

SEARLE

COLT.

Thoman Bevan died some years since intestate and insolvent.

The present bill was filed on the 8th November, 1839, by Charles Edward Searle against Mr. and Mrs. Colt, Sir J. D. Colt, and Robert Abraham. It alleged that Andrew Searle's annuity was for several years paid by the defendant, Edward Vaughan Colt, but, that being two quarters in arrear on the 18th October, 1820, Andrew Searle, on or about the 7th November following, sued out execution against the said E. V. Colt, for the same, under which he was taken in execution, after which he took the benefit of the Insolvent Act, and was discharged in 1821. That Andrew Searle was not able to obtain payment of his annuity out of the Bushbury estate, inasmuch as upon afterwards giving notice of his claim to the tenants, he discovered the subsequent grant of the annuities to Abraham, chargeable upon the same estate, and that Abraham, by the form of his memorial, and his representations to the tenants, had led Searle to believe that he had the legal right, notwithstanding Searle's priority. That, under colour of such right, Abraham had been in receipt of the rents and profits from April, 1820, till his death, to the unjust exclusion of Searle. That the plaintiff had lately discovered that Abraham's annuities were void, by reason of defects in memorial of them, and that no memorial of the indenture of assignment of the 20th April, 1820, had ever been inrolled.

The bill prayed that the annuity granted to Andrew Searle, by the indenture of the 18th April, 1810, might be established and enforced, and the arrears paid; and that it might be declared that the indenture of the 20th April, 1820, and the annuities thereby purported to have been granted, were wholly void by reason of the defects in

SEARLE v. Colt. the memorial thereof. And in case the Court should be of opinion that such annuities were not void, then that it might be declared, that the indenture of assignment of the 20th April, 1820, was void, for want of a due inrolment of a memorial thereof, and was ineffectual to pass the 500 years term; and that the rents and profits having been received wrongfully by Thomas Abraham, his representatative, the defendant Robert Abraham might be decreed to account for them to the plaintiff; that Sir J. D. Colt might execute a legal demise of the premises to the plaintiff for ninety-nine years, and that the plaintiff might have the benefit of the mortgage term of 500 years, &c.

The defendants, Mr. and Mrs. Colt, by their answer, admitted the allegations in the bill as to the payment of the plaintiff's annuity, the execution issued against the defendant, Colt, for two quarters' arrears, and his subsequent insolvency.

The defendant, Abraham, by his answer, stated, that he was unable to answer as to his belief whether any payments had ever been made to Andrew Searle on account of his annuity, or whether he had ever been unable to obtain payment, but he believed he had never obtained or attempted to obtain payment of it as stated in the bill. He stated his belief, that Thomas Abraham never had notice of the plaintiff's incumbrance; and insisted that he was a purchaser for valuable consideration. He also relied on the Statute of Limitations, in the terms which will be stated in the judgment. In addition to his title, as admitted by the bill, he also set up a title under a deed of receivership of the Bushbury estate, executed by Mr. and Mrs. Colt to Richard Smith in 1807, to secure payment of interest of a sum of £300, secured on the leaseholds at Dilwin, which receivership was assigned by Smith to Abraham in September, 1821, in consideration of his paying off the £800.

The cause now came on for hearing.

The plaintiff failed to prove the allegations in the bill as to payment of his annuity, and the insolvency of the defendant, Mr. Colt. SEARLE COLT.

The defendants, Mr. and Mrs. Colt, did not appear.

After some discussion, in the course of which the cases of Buckeridge v. Flight (a), Gibbs v. Hooper (b), and Exparte Mackreth (c), were cited, it was admitted that the memorial of Abraham's annuities was invalid, by reason of an insufficient statement as to the number of witnesses.

The cause then proceeded.

Mr. Simpkinson, Mr. Swanston, and Mr. Anderdon for the plaintiff.—It being indisputable that the defendant's annuity is void, for want of a proper memorial, the first question is, what is the worth of the deed of assignment of April, 1820. It appears that the term of 500 years was assigned to Bevan, as a trustee for Abraham, not to secure repayment to Abraham, as mortgagee, of the money paid by him to Smith, but further to secure to him due payment of the annuity, and subject thereto for Colt and wife. The consideration for that assignment formed part of the consideration for the annuity. It is impossible, therefore, to contend that this deed was not so connected with the annuity as not to come within the provisions of the former and present Annuity Act. Abraham's interest in the term, therefore, not being that of a mortgagee, but only that of an annuitant, it follows, that, if his annuity deed is void, the deed which is executed as an additional security for the annuity is equally void. It is void, also, as not being itself inrolled. [The Vice-Chancellor.—Is the assignment to Bevan void?] Certainly not: and, therefore, the plaintiff calls upon the Colts to procure him a legal assignment of the term from Bevan. It is clear that the Colts cannot set up that term against the plaintiff.

<sup>(</sup>a) 6 B. & C. 49.

<sup>(</sup>b) 9 Sim. 81.

<sup>(</sup>c) 2 East, 563.

1841. SEARLE COLT.

No notice was taken of it, either in the marriage settlement, or the deed of 1810. The lands were conveyed to the trustees of the settlement, as if unincumbered.

Then, as to the question of laches, and the Statute of Limitations. There are several cases in which it appears, that nearly 20 years had elapsed before the annuity was impeached, and yet the Court entertained jurisdiction: Van Braam v. Isaacs (a), Phillips v. Const (b), Ex parte Mackreth (c). [The Vice-Chancellor.—Do you allege pernancy and enjoyment within 20 years?] The bill contains a clear allegation to that effect. Whether it be sufficiently proved is a question for the Court to determine. Abraham admits that, antecedently to the time he took possession, the Colts were in possession. The question, therefore, is, whether, in a case in which Abraham himself took possession only in 1821, and, consequently, had only adverse possession since that time, he is at liberty to avail himself of the benefit of the stat. 3 & 4 Will. 4, c. 27, as against the plaintiff. only do so by including in the period of his possession the time occupied by the Colts. But the possession of the Colts was the possession of the plaintiff: it was a mere permissive possession of the rents and profits. Vice-Chancellor. — What evidence is there as against Abraham that the Colts paid the annuity to the plain-The admission of the Colts that the annuity was paid to 1820 would be no evidence against Abraham.] Abraham does not deny the payment. He says he does not know whether the annuity was paid or not. Vice-Chancellor.-Was not that sufficient to render it incumbent on you to prove payment if you could?] The Court will look at the situation of the parties. The possession of the mortgagors was not adverse to the plaintiff: Hall v. Doe (d). As to Abraham, he is not in a

<sup>(</sup>a) 1 Bos. & Pull, 457.

<sup>(</sup>c) 2 East, 568.

<sup>(</sup>b) 3 Russ. 267.

<sup>(</sup>d) 6 B. & Ald. 687.

situation to set up adverse possession to any body; having no title whatever.

SEARLE V. COLT.

At the close of the argument for the plaintiff, *The Vice-Chancellor*, with reference to the protection which the defendant Abraham claimed under the mortgage term of 500 years, called the attention of counsel to the case of *Parry* v. *Wright* (a).

On the following day, however, his Honour suggested, that the main question for the consideration of Abraham's counsel seemed to be, whether the bill should be dismissed, or the plaintiff be allowed an inquiry, with a view to relieve himself from the operation of the Statute of Limitations.

Mr. Cooper and Mr. Goodeve for the defendant Abraham. -The first question is, whether, independently of time and laches, the Court has jurisdiction to entertain this bill. This is a bill, not by the grantor of the annuity, but by a prior annuitant, calling upon the Court to declare the defendant's annuity void. But it never was intended that this jurisdiction should be exercised, either at law or in equity, in favour of any person but the grantor, or those claiming under him. Courts of law have decided, that no application should be made to them under the annuity acts, except by the grantor: Garrood v. Sanders(b). And the same rule must extend to courts of equity. The object of the annuity acts was to protect the immediate grantors, by giving them the means of referring to the security, and, under certain circumstances, of avoiding it; but this protection was not given to any other party.

As to the Statute of Limitations, it is immaterial whether there has been adverse possession or not; and in fact,

<sup>(</sup>a) 1 S. & S. 369; 5 Russ. 142.

<sup>(</sup>b) 6 T. R. 403.

SEARLE V. COLT. the statute abolishes the doctrine of adverse possession, except in reference to peculiar cases, mentioned in the 15th and 22nd sections: Nepean v. Doe (a). It is also immaterial whether there has been a receipt of this annuity or not. Searle's right to recover the annuity first accrued in 1810, when the instrument creating it was executed. Now Searle never having been in possession or receipt of the profits of the land, and consequently never having been dispossessed, the time must be considered to have run against him from 1810, by virtue of the 3rd section; and it is unimportant in that view of the case, whether any payments were made to him or not. That such is the proper construction of the statute, is evident from Dearman v. Wyche (b); and although the statute, 7 Will. 4 & 1 Vict. c. 28, withdraws mortgages from that construction, yet it applies to that species of incumbrance only. [The Vice-Chancellor.—There is no proof here, that Searle ever received any payment at any time whatever in respect of the annuity.]

Independently of the question of laches, the plaintiff has no priority. Here are two equal incumbrancers. The first gives no notice to the trustees of the legal estate, and the second has given notice by entering into the receipts of the rents and profits. [The Vice-Chancellor.—I doubt whether you can be treated as an incumbrancer, within the meaning of the rule, the Annuity Act having declared your annuity void.] The defendant has a lien for his purchase-money, though the annuity be void. The Court would not interfere to set aside the annuity, without returning to the defendant his principal and interest, and the bill does not seek to prevent it. It may indeed be contended, that, having taken the mortgage term, he has, upon the principle of Toulmin v. Steere (c), and Parry v. Wright, extinguished his mortgage right;

<sup>(</sup>a) 2 Mee. & Wels. 911. (b) 9 Sim. 570. (c) 3 Mer. 210.

but, admitting that to be so, he is an incumbrancer on the fund to the extent of £1600, and is entitled to avail himself of all legal remedies which flow out of that situation. In addition, however, to the term of 500 years, he has another charge on the premises, arising out of the receivership. SEARLE S. COLT.

Lastly, it is not the practice of the Court to direct an inquiry at the instance of any party, who has not laid some ground for it: Connop v. Hayward (a), Earl v. Picken (b). And here the plaintiff has failed to prove a material fact in his case. Besides, he has no merits to induce the Court to do any thing out of the ordinary course. He comes forward at a late period to avail himself of a highly penal act of Parliament, against a person who is equally a purchaser for value with himself. Had he come earlier, the defendant, Abraham, might have had an opportunity of bringing an action against his solicitor for negligence and breach of professional duty as to the memorial. Champion v. Rigby (c).

Mr. Parry, for the defendant Sir J. D. Colt.

Mr. Simpkinson in reply.—This is not an application under the Annuity Act; but the act having declared the annuity void, the bill seeks consequential relief. Admitting that the plaintiff may not have a right to have the annuity deed delivered up, yet he is entitled to have the benefit of the term. The argument on the other side, upon the construction of the Statute of Limitations, goes a great deal too far. It is said, that the right of Searle to make an entry accrued in 1810, when the annuity was granted; and that, whether an adverse possession or not is required under the statute, Searle, in consequence of never in fact

<sup>(</sup>a) Ante, p. 33. (b) 1 R. & M. 547. (c) Taml. 424; 1 R. & M. 539.

SEARLE V.

having been in possession, must be barred by the statute. But it will be found that the demise to Thorpe was to secure better payment of the annuity, and there was no power of entry in Thorpe, unless the annuity were in arrear twenty-one days. Therefore, assuming that the plaintiff has proved payment of the annuity to 1821, it is essential to ascertain at what times and under what circumstances this annuity was paid. The possession, which would be a bar under the statute, has not taken place. It is imperative on the Court to inquire whether the payments proved against Colt and wife were regularly made, and were made so as to exclude the operation of the 2nd and 3rd sections of the statute. The argument on the other side, goes to the extent, that if there has been payment of interest within twenty years, yet if there has been no acknowledgment in writing, or the mortgagor has been in actual possession for twenty years, the mortgagee is barred from filing his bill of foreclosure. But there is no authority for that proposition, except the bare opinion of the Court in Dearman v. Wyche. The statute 1 & 2 Vict. c. 28, is merely explanatory.

Nov. 16th.

THE VICE-CHANCELLOR.—In this case, the original bill was filed on the 8th of November, 1839, and, after the defendant Abraham's first answer, was amended, under an order dated in May, 1840.

The plaintiff is the personal representative of Andrew Searle, who was a gentleman resident in Norfolk, and died in the year 1835. He sues in that character as an equitable incumbrancer on the life estate of the defendant, Mrs. Colt, in a messuage and lands at Bushbury in Staffordshire, that life-estate being an equitable interest derived under her marriage-settlement, dated in the year 1804, by which she conveyed this property, previously her own, so as to vest it in certain trustees in fee-simple, upon trust, for her separate use for her life, and after her death, for

other purposes. Of these trustees, the defendant Sir John Dutton Colt is the survivor, and in him, accordingly, the legal freehold and inheritance are vested. SEARLE S. COLT.

The only other defendants are Edward Vaughan Colt, who is Mrs. Colt's husband, and Robert Abraham, who is the personal representative of Thomas Abraham, deceased.

The incumbrance, under which the plaintiff claims, is a deed of the 18th of April, 1810, by which, for valuable consideration, an annuity of £122 per annum for the life of Mrs. Colt was granted by Mr. and Mrs. Colt to Andrew Searle, his executors, administrators, and assigns, and charged by her on her life-estate in the Bushbury property; and for better securing it, she by the deed appointed to James Thorpe, and directed the trustee or trustees of her marriage settlement to demise to him the messuage and lands in question for a term of 99 years, upon trust, for raising and paying the annuity. To this security neither Sir John Colt nor his late co-trustee, Mr. Sayer, was a party.

The object of the suit is, to make available the incumbrance of 1810, to have it clothed with the legal estate, and to obtain payment of the annuity and its arrears.

The bill alleges the annuity to be in arrear from some time in the year 1820, if not from an earlier period; I am not sure whether the expression in it is "two years in arrear on the 18th October, 1820," or "two quarters in arrear" on that day. It asks a receiver of the rents of the Bushbury estate, and impeaches as invalid a security of the 20th of April, 1820, claimed by the defendant Abraham, and asks an account against him of the rents of the Bushbury property for a long series of past years.

To the demands made by this bill, Mr. and Mrs. Colt, and Sir John Colt, have not either wholly or partially offered any opposition. Mr. and Mrs. Colt did not appear at the hearing. Sir John Colt did appear, but as a trustee merely, making no case. The contest is be-

1841. Searle

COLT.

tween the plaintiff and Mr. Abraham, whose claims are thus:—

In 1820, Thomas Abraham contracted to purchase of Mr. and Mrs. Colt a present annuity of £160 per annum, and a further deferred annuity for her life, to be charged upon certain property, including her life interest in the Bushbury estate. This contract was carried or intended to be carried into effect, by indentures dated the 20th April, 1820, by which, for a price agreed, being a valuable consideration, these annuities were by Mrs. Colt granted accordingly, and charged on her life interest in the Bushbury estate. Part of the money was, by arrangement, applied in paying off a mortgage on that property, vested in Richard Smith, which was prior to the marriage settlement, and preceded it in title. The mortgage had been by demise for a term of 500 years, carrying with it the legal estate in possession. This term, Smith, on recciving his money, assigned by one of the deeds of 1820 to Thomas Bevan, upon trust for better securing Abraham's annuities, and subject thereto, upon trust for securing to Mr. and Mrs. Colt the re-payment of the principal paid to Smith, and subject thereto to attend the inheritance. This transaction required for its validity, the inrolment of a memorial under the Annuity Act then existing, and it is admitted, that there was not any proper or sufficient memorial inrolled; but the annuities have nevertheless been uniformly insisted upon by the Abrahams; nor, except this suit, does there appear to have been at any time, by any person, any attempt to impeach their validity, or to question them. Sir John Colt was not, nor was Mr. Sayer, a party to either of these deeds, though they were intended and expressed to be parties to one of them.

The defendant, Abraham, also claims to be an incumbrancer upon Mrs. Colt's life interest, under a deed of receivership, by way of security, alleged to have been executed

in 1807, by Mr. and Mrs. Colt to Smith, to the benefit of which it is alleged that in 1821, by means of a deed dated in that year, Thomas Abraham became entitled. If it were material to consider and decide upon this alleged incumbrance, its existence and validity would properly form the subject of inquiry—an inquiry however, which, for the reasons that I shall state, I think unnecessary.

Neither Sir John Colt nor Mr. Sayer was a party, as far as appears, to the alleged security of 1807, or to the transaction of 1821.

It appears that in the year 1821, if not earlier, Thomas Abraham took possession of the Bushbury estate, claiming under all, or some, or one, of the titles to which I have referred. The bill states that he received the rents from and after the date of the 20th of April, 1820, until his death. The answer of Robert Abraham states that, upon the execution of the deed of 1821, or shortly thereafter, Thomas Abraham, as the defendant has been informed and believes, took possession, and continued in undisturbed possession to his death, and that upon his death, the defendant, as his administrator, entered into possession, and continued undisturbed in such possession to the time of filing the bill.

These facts as to the possession of the Bushbury estate, before and after the death of Thomas Abraham, which happened in 1829, are not in dispute between these parties; it is not suggested by the plaintiff, nor is there any trace in the cause, that his title, or that of Andrew Searle, has ever been admitted or recognised by either of the Abrahams, or that any payment or satisfaction of or on account of the plaintiff's annuity or any part of it, has, at any time since the year 1820, been made by any party, or in any manner, or that the plaintiff, or Andrew Searle, has ever received any portion of the rents, or had any possession by himself or otherwise of the Bushbury estates.

SEARLE V. COLT. SEARLE v. Colt.

Robert Abraham denies, and it is not proved, that Thomas Abraham ever had any notice of Andrew Searle's title, and his first answer, among other things, insists thus:-"This defendant insists on the validity of the said annuities granted to the said Thomas Abraham: and, under the circumstance of the said Thomas Abraham being such purchaser thereof without notice of the said complainant's alleged annuity as aforesaid, this defendant insists on such purchase in bar to all the relief sought by the said complainant's said bill, and upon the benefit of the term in the said freehold premises so assigned to the said Thomas Bevan, as a trustee for the said Thomas Abraham as aforesaid, and such assignment to him as aforesaid. And if this Honorable Court should be of opinion, that the same annuities are invalid by reason of such default of the memorial thereof, as in the said bill alleged or otherwise, then this defendant insists upon the Statute of Limitations of actions and suits in bar to all the same relief; and. at all events, this defendant saith that the complainant, as well as the said Andrew Searle, through whom he alleges himself to derive his title, have been guilty of gross laches in the prosecution of the claim of the said complainant; and this defendant insists, that, under the circumstances aforesaid, no relief ought now to be afforded the complainant in a court of equity, in respect of any of the matters, the subject of this suit." His second answer concludes as follows:--"This defendant insists on the several matters insisted on by him in his said answer to the said original bill in bar thereto, and in bar to all the relief sought by the said complainant's said amended bill."

Now this state of the pleadings and facts is, in my opinion, destructive of the plaintiff's case, as between him and Robert Abraham; for whatever may be the infirmities of Abraham's title, the plaintiff must succeed by the strength of his own; and whether the case, so far as time

is concerned, be considered with reference to statutory limitation, or to the general principles of equity applicable to laches and stale demands, it is, I think, impossible to give him relief.

SEARLE V.

I have mentioned the year 1820, but, in truth, as the evidence stands between the plaintiff and Abraham, there is not the least proof, that at any time whatsoever Searle's annuity was wholly or partially paid or recognised; or that his security, dated, as it is, in 1810, has ever been treated as valid, or has not been from the commencement a dead letter; the bill, as I have said, not having been filed until November, 1839.

It has been urged, that, as the Colts make no opposition, and as a dismissal of the bill between the plaintiff and Abraham might be conclusive, an inquiry ought to be directed, with a view to enable the plaintiff to deliver himself, if he can, from the effect of the defence founded on length of time. The Court ought, however, to be cautious how it allows the case of one defendant to be prejudiced by the course or conduct of other defendants in the cause; but above all, it ought to be so, when there seems a good understanding between the plaintiff and the rest of the defendants. Nor should it be forgotten that Thomas Abraham took and paid for his securities, (whether impeachable or valid), without notice of the title now set up; that they have not, as far as appears, been questioned by any other person than the plaintiff; that the original purchasers of the plaintiff's and defendant's annuities had both died before the bill was filed; and that the case stated by the plaintiff himself in that bill, is one not only not suggesting any reasonable apology for the time, but admitting an extent of delay, probably of itself, if all his allegations were proved, entitling this defendant to be dismissed from the suit. These allegations are, however, as I have said, not proved, and I am on the whole, of opinSEARLE v. Colt.

ion, that I should not be doing justice, if I detained Mr. Abraham longer before the Court; he must, therefore, on the ground of length of time, be dismissed with costs.

With regard to Sir John Dutton Colt, I think that the claims of Mr. Abraham, whether well or ill founded, render it improper for me now to direct that trustee to execute a demise under the direction contained in the deed of 1810. I shall therefore dismiss the bill against Sir John Colt, and, if he asks it, with costs. But, as a state of things may exist in which hereafter the plaintiff may be entitled to call for such a demise, I think that the dismissal of Sir John Colt should be without prejudice to a new bill. That reservation, however, is not to be extended to Mr. Abraham.

The plaintiff will, as against Mr. and Mrs. Colt, if there be indeed any difference between them, take a decree in the usual way.

The questions upon the defective state of the record in respect of parties, both as to the term of 500 years, and as to Thorpe, the trustee of Searle, and Hoggins, the trustee of Abraham, were, during the argument, waived by the parties appearing, each of whom joined in requesting the Court that the cause should be heard and decided without additional parties; and to this application, in the particular circumstance of the case, the Court considered that it might properly accede. That arrangement of course, however, does not affect Mr. and Mrs. Colt, if they are substantially different parties from the plaintiff.

1841. Nov. 13th.

CLARK v. WILMOT.

THE bill was filed by the representatives of John Allen for the foreclosure of a mortgage for a term of years deceased attorcreated by the defendant, Wilmot, in certain houses at Clerkenwell, by an indenture, dated the 2nd May, 1825: which mortgage was duly registered. The defendant, W. in a bill of fore-Wright, claimed an interest in the same premises as the that the whole assignee of an equitable mortgage by deposit of title deeds, alleged to have been made by Wilmot to one Lang- tothedefendant, don in February, 1821. Langdon having become bank- was no usury; rupt in 1830, his official assignee, George John Graham, though not was made a party to this suit.

The defendant, Wright, opposed the plaintiff's claim on torney, being from two grounds—first, that Allen's security was usurious, us part of the mortgage-money having been retained by the mortgagee; secondly, that Allen had notice of the defend- mortgagor is a Release. ant's incumbrance.

The cause now came on for hearing.

Mr. Cooper and Mr. Koe, for the plaintiffs.

Mr. Simpkinson, Mr. Le Neve Foster, and Mr. Bellamy, for the several defendants.

In order to disprove the alleged usury, by shewing that the whole of the mortgage-money had been paid by Allen to Wilmot, the plaintiff's counsel gave in evidence certain entries in the books of Mr. Keane, deceased, who was the solicitor of Wilmot at the time of the mortgage, which were to the effect that he had received the money (and paid it over to Wilmot.) It appeared, that, by taking these items into the account between Keane and Wilmot, Keane ap-

Entries in the books of the ney of the defendant admitted as evidence for the plaintiff closure, to prove mortgage money had been paid and that there such entries, against the interest of the atma ten a meda in the

nel course of anhie ag' has

Bankrupt competent witness for a party claiming an incumbrance prior to the mortgage, to shew that the mortgagee had notice of such incumbrance. but he is not a competent witness to shew that the mortgage was usurious; as the effect of his evidence, in the latter case, would be to discharge his estate from a possible liability to the costs of the suit. An official as-

signee, disclaiming all interest in the suit, may be dismissed at the

hearing, with costs, to be paid to him by the plaintiff; but in such case he must disclaim absolutely, either by his answer or at the bar.

See 3 y 0 C, 259 (wate) constring margine water

1.0h. 2

he brate

CLARK
v.
WILMOT.

peared to be to a slight amount a creditor of Wilmot; by rejecting them he was his debtor.

This evidence was objected to on the ground that it went to discharge as well as to charge Keane.

THE VICE-CHANCELLOR said, that that made no difference in the application of the general rule; he also referred to *Doe* d. *Pattesall* v. *Turford* (a). He received the evidence.

The allegation of notice in the answer of the defendant, Wright, was in these terms:—"That the said John Allen, at the time he took the mortgage, had actual or constructive notice of his, the defendant's incumbrance." In support of this statement, and also to prove the usury, the defendant, Wright, proposed to read the evidence of Wilmot. As to the former point, Wilmot stated that he had given notice of his lien or equitable mortgage to Clark, the solicitor of Allen, either at the time or prior to Allen's advancing the money.

The plaintiff's counsel objected:—First, that the statement in the answer was not sufficiently specific to enable the plaintiff to meet it by evidence; and therefore no eviden could be read in support of it;—that Wilmot's evidence, however, on this point could be of little weight, inasmuch

(a) 3 Barn. & Ad. 890. In this case, Maule, arguendo, says—"Entries or admissions made by deceased persons are admissible to prove facts not ordinarily proveable by hearsay, in two cases only; first, where the entry or declaration is against the interest of the party making it; secondly, where it is made in the regular course of business; but, in the latter case, it is not so much by way of state-

ment of a fact that it is evidence, as because it is part of a transaction which, being proved, the other parts are presumed from it." Upon which Parke, J., says—"I agree in the rule laid down; but I think that, in the second case, a necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with the other."

as it was perfectly consistent with mere constructive notice, which was not sufficient as against a registered mortgage. Secondly, that Wilmot's evidence was, on the ground of interest, inadmissible to prove the usury.

CLARK U. WILMOT.

THE VICE-CHANCELLOR, upon the first point, said, that though the statement in the answer was general, he could not say that the defendant was precluded from giving evidence either of actual or constructive notice. What weight would be attached to such evidence was another question. As to the other point he was of opinion, that the evidence of Wilmot was receivable to prove the notice to Allen, but not to prove the usury. If usury were not proved, the case might take such a turn, as that the costs of the suit might be thrown on Wilmot's estate; but if he were allowed to prove the usury, the plaintiff's bill would be dismissed, and no costs thrown on Wilmot's estate.

After The Vice-Chancellor had decided these points, Mr. Simpkinson referred to Hughes v. Garner (a), as being coincident with his Honour's decision on the first point.

Mr. Bellamy, for the official assignee, then asked for his costs; citing Woodward v. Haddon (b), and Peake v. Gibbon (c). In answer to a question from the Court whether his client disclaimed, he said he claimed by his answer no interest other than such interest, as official assignee, as the Court might adjudge to him.

THE VICE-CHANCELLOR said, that this was in effect claiming every thing which by possibility he could, and that if he did not disclaim absolutely, he must remain before the Court; but if he disclaimed absolutely at the bar, he could have his costs from the plaintiff.

## Mr. Bellamy then disclaimed absolutely.

(a) 2 Y. & C. 328, 571. (b) 4 Sim. 606. (c) 2 Russ. & M. 354.

1841.

Nov. 15th. Where a document in the possession of the defendant is produced and read by the plaintiff at the hearing, under a general order for its produc-tion, the defendant will not be allowed to read from his answer any statement in explanation or qualification of the document, (except as to the possession of it); but the Court, if necessary, will direct an inquiry on the subject.

1. Have 524

## MILLER v. Gow.

COUPLAND and Duncan, commission merchants at Liverpool, made it part of the usual course of their business, to induce merchants and manufacturers in England to ship goods through their house at Liverpool to Remington & Co. of Bombay. They also frequently shipped goods on their own account in the names of other persons. In the course of these transactions, they procured Crawford & Co., of London, to advance money to the actual or nominal shippers, as the case might be, on the security of the bills of lading, and of the policies of insurance which were effected on the goods. On the 29th July, 1886, Gow who was a linen factor at Manchester, received a letter from his brother-in-law. Eadie, who was in the employment of Duncan & Coupland as their clerk and bookkeeper, informing him that he had shipped to Bombay, in Gow's name, certain goods, for which Gow would shortly receive £1100 in bank post bills, which he was to indorse and transmit to him, Eadie. On the 31st July, Gow received the £1100 in bank post bills from Crawford & Co., and forthwith indorsed and sent the bills to Eadie. The goods were soon afterwards sent to Remington & Co., at Bombay, and in November, 1836, a flat in bankruptcy issued against Coupland & Duncan.

Remington & Co. received the goods, sold them, and remitted the proceeds, amounting to £1828, in bills of exchange to Crawford & Co., who not only repaid themselves thereout the sum of £1100, but claimed to hold the surplus in part discharge of other debts due to them from Coupland & Duncan.

The bill was filed by the assignees of Coupland & Duncan against Gow and Crawford & Co., praying for an account of the surplus proceeds and payment. The case made by the bill against Gow was, not only that he was the party legally

interested in the goods; but that, although he was ignorant of the use of his name in the first instance, yet he subsequently assented to it, and claimed a substantial interest in the transaction, by charging the assignees with a sum for commission, trouble, and risk; and that he had refused to assign to them, without payment of such commission: for which reason, as they contended, he was liable to the costs of the suit.

The bill having been amended, with a view to strengthen the case against the defendant Gow, he, by his answer to the amended bill, stated, that having heard, since the bankruptcy of Coupland & Duncan, that Messrs. Remington & Co. intended to remit the proceeds of the goods in cotton, and being apprehensive that the liabilities he was under by reason of his name having been used, might thereby be increased, he, for the mere purpose of protecting himself and not with any other view, wrote and prepared to send to Remington & Co., a letter dated the 24th May. 1837. [Then followed the letter, verbatim, in which he spoke of his shipment, and stated that he had never authorized any remittance, except by bills at the best exchange of the day, and that he repudiated all investments in cotton.] The defendant then proceeded to state, that he sent a letter to Crawford & Co., dated the 25th of May, 1837, by which he informed them of having written to Remington & Co., and in which he inclosed a copy of his letter of the 24th May. He then stated, that, having afterwards heard that Remington & Co. had abandoned their intention of remitting the proceeds in cotton, he did not send them the before-mentioned letter of the 24th of May. a subsequent part of the answer he alleged as follows:--"And this defendant says, that he has now in his possession or power, a copy of his said letter, dated the 24th day of May, 1837, and addressed but not sent to the said Messrs. Remington & Co., and also a copy of this defendant's said other letter to the said Messrs. Crawford & Co.

MILLER 9. Gow. MILLER v. Gow. bearing date the 25th day of May, 1887, to which lastmentioned letter a copy of the said letter of the 24th of May, 1887, was annexed, as hereinbefore in that behalf is mentioned; which several last-mentioned letters this defendant has hereinbefore set forth."

Upon the admission contained in this paragraph, the plaintiffs moved for and obtained the usual order for the production of the copies, &c., of letters of the 24th and 25th May, 1837.

The cause now came on for hearing.

Mr. Swanston, Mr. Long, and Mr. Rolt, for the plaintiff.

Mr. Simpkinson, and Mr. Bacon, for the defendant Gow.

Mr. Teed, and Mr. Wigram, for the defendants Crawford & Co.

The plaintiff's counsel, in support of their case against Gow, read the copy of the letter of the 24th May, 1837, which had been produced under the order.

The defendant Gow's counsel contended, that, this document being read, all the circumstances mentioned in the answer in connexion with it should be read; more especially as the clause in the answer in which the possession was admitted, and on which the order for production was founded, specifically referred to the circumstances under which the letter was written. \[ The Vice-Chancellor.—Certainly the reference is carried farther than usual. is a specific reference to specific circumstances relating to a particular document. It is a hard state of things, if the defendant is not to be allowed to explain this document, which he may never have an opportunity of explaining in any other way; and which, in fact, he has explained in his answer. But, the question is, whether there is any distinction in principle between a general and specific reference.]

The plaintiff's counsel.—We read no part of the answer relating to this document, except with reference to the possession of it. The defendant, therefore, is not entitled to read any passage in the answer relating to this document, except perhaps such as may qualify the possession or right of production: Taylor v. Salmon (a).

MILLER V. Gow.

THE VICE-CHANCELLOB.—The practice at law is clearly established, that, when an answer is used, the whole must be read. It is different in this Court; but the rule here is, that you cannot in reading sever parts that in substance are connected together. When, however, a document is produced from the custody of the clerk in court, under a bill for relief, the plaintiff is, I apprehend, entitled to use it, without reading that part of the answer which precedes the admission of the possession of the document. I cannot conceive this rule to be likely in any case to produce practical inconvenience, because the Court may look at the whole answer, if not as evidence, yet as that which may regulate its discretion with respect to the further investigation of particular facts. I shall not break through the general rule in this case, but shall admit the document in evidence, simply as coming out of the defendant's possession. The defendant, however, will be entitled to suggest for the consideration of the Court, as fit subjects for inquiry at least, any circumstances affecting the document, which may appear on the face of it or are stated by the answer.

(a) 3 Myl. & Cr. 422.

1841.

RYAN v. DANIEL.

Nov. 19th. Two young officers in the army sign and hand over to each other certain documents, by which each charges his real and personal estate with £1000 in favour of the other, in case the other should survive him; the inducement for this undertaking, as expressed on each instrument, being that the other had, by an instrument of even date, left the writer the same sum in case the writer should survive him. The officers soon afterwards separate, and after the lapse of many years, agree to cancel the engagement, but die before the mode of cancelment is definitively settled:-Held, that, taking into consideration the circumstances instruments were made, and the situation in life of the parties, the sur-

vivor had no

JOHN Bourke Ryan and Nicholas Charles Daniel, being in the Horse Guards in 1792, drew up and gave to each other counter memorandums of the same date and form, except that the document in each party's respective possession contained the name and signature of the other party.

The document which was the subject of the present suit was in the following form:—

Brighton, 12th June, 1799.

In case I die before John Bourke Ryan, Esq., I hereby charge all my real and personal property with the sum of £1000, to be paid immediately after my decease by my executor, he having, by a writing of the same date, left me the same sum in case I should survive him.

(Signed) NICHOLAS CHARLES DANIEL.

Witness, J. Hoskings.

Soon after this transaction the parties separated, and never afterwards met.

In 1828, Ryan wrote a letter to Daniel dated the 18th December in that year, in the following terms:

"Dear Sir,—There exists an engagement entered into by Held, that, taking into consideration the circumstances under which the instruments were made, and the situation in life of the par-

purely equitable claim which he could enforce against the estate of the other.

Quære, whether he had a legal claim, and whether, if legal originally, it was not legally cancelled.

may be settled. Your answer to this will be my guide. I remain, yours, &c.,

J. B. RYAN."

RYAN
v.
Daniel.

In answer to this letter, Daniel wrote a letter to Ryan, dated the 11th January, 1829, in which he assured Ryan that he was equally anxious with himself to put an end to the engagement, and deprecated the notion of their respective executors being involved in litigation. He also stated that he would send the document in his possession to his solicitor in town, and proposed that some deed of relinquishment should be executed. He at the same time wrote a letter to his solicitor, Mr. Waterman, in which, after stating what had occurred, he expressed himself thus:--"He (i. e. Ryan) will call on you to settle a deed of relinquishment. When he signs his part, send it to me, and I will sign mine." The following paragraph was added by way of postscript. "As I have great reliance on you, I send you the agreement, which you may give him on getting mine." The document was inclosed in the letter.

Ryan received Daniel's letter, but never called at Mr. Waterman's office, and nothing further took place between the parties. Daniel died in May, 1833, and Ryan in December, 1835.

The bill was filed in Trinity Vacation, 1838, by Mary Ryan, administratrix with the will annexed of John Bourke Ryan, against George R. Daniel, devisee of the real estates and executor of Nicholas Charles Daniel, and it prayed that the agreement of the 12th June, 1799, might be specifically performed, and that the sum of £1000 thereby secured, might be paid to the plaintiff out of Daniel's estate. The defendant admitted assets, but submitted that he was not liable to pay this demand.

Mr. Purvis and Mr. Stephenson for the plaintiff.—This

RYAN v. Daniel.

is a contract which ought to be performed. Supposing even that it is a wager, it is good in law, unless public policy or some statute renders it bad, which is not the case here. It may, indeed, be urged that these documents give an interest to one party to destroy the other, but the same objection might be made to a settlement, in which the most important interests in life are made to depend on such contingencies. No one doubts, that if an estate is limited to A., with remainder to B., but if B. die in the lifetime of A., then to C., the remainder to C. is good. Agreements to divide property, which may come to persons on a contingency, have been frequently supported: Wethered v. Wethered (a), Hyde v. White (b), Harwood v. Tooke (c), Beckley v. Newland (d), and that wagers may be legal is evident from Hussey v. Crickett (e), Lord March v. Pigot (f), Good v. Elliott (g). It is submitted, that the agreement is not put an end to by the correspondence. Both parties wish to relinquish it, but Daniel wishes to do so in a more legal form than is suggested by the other. He does not accept the other's terms, that is to say, mutual cancelment, but he proposes a deed of relinquishment, and directs his attorney not to seek out the other party, but to wait till he calls.

THE VICE-CHANCELLOR.—If a legal debt, still subsisting, was created by this document, the Court might be bound to give effect to it; but I am not satisfied that a legal debt, not legally extinguished, was created. The question then is, whether this is such a demand as a court of equity will give effect to, the debt not being legal. I am of opinion that it is not.

(a) 2 Sim. 183.

(b) 5 Sim. 524.

(c) 2 Sim. 192.

(d) 2 P. W. 182.

(e) 3 Camp. 168.

(f) 5 Burr. 2602,

(g) 3 T. R. 693.

The documents bear upon the face of them every mark of improvidence. Without reference to change of circumstances, marriage, children, or diminution of fortune, they were executed in 1799 by gentlemen in the army, who afterwards lost sight of each other. It is a remarkable circumstance, that, in each of these papers, the word "left" occurs. I am not satisfied they were meant as contracts, in the legal or equitable meaning of the term. Speaking as a lawyer, I am not satisfied that the instruments were not testamentary. On that, however, it is not necessary to give an opinion.

Looking at the circumstances of the case—the time of the transaction, the age of the parties, and the condition in society in which these gentlemen stood, and looking at their correspondence, which took place at a remote time subsequently, in which one offers to relinquish the claim or to have it completed in legal form, and the other expresses his willingness to relinquish it, I think it impossible that a court of equity can treat it as an equitable debt, if it is not a legal one. If, on the other hand, it is a legal debt not legally cancelled, it may be my duty to give effect to it, by directing payment of it out of the assets. I, therefore, propose, subject to the observations of the defendant's counsel, to retain the bill for twelve months, with liberty to the plaintiff to bring an action.

Mr. Boteler and Mr. Wilcock, for the defendant.—The bill should be dismissed with costs. If this document is testamentary, it has not been proved as such. If it is not testamentary, it is in form either a wager, or a contract for a life insurance, in which the party assuring had no interest. But, in truth, the contract, such as it is, is at an end; for Daniel's answer is clear as to his intention, that it should be put an end to, and the other says, "Your answer shall be my guide." Supposing, however, the con-

RYAN

DANIEL.

RYAN
v.
Daniel.

tract not to be at end, as far as the intentions of the parties were concerned, the question will be, whether it is consistent with public policy, that two officers should wager the life of one against that of the other. In the cases which have been cited, the position of the parties was different. The Court will leave the party to her legal remedy.

THE VICE-CHANCELLOR.—I have said that, in my opinion, the plaintiff, unless she is a legal creditor, has no equity. But a legal creditor, proceeding against assets, has a right here, whether the assets are admitted or not, especially where the instrument purports to charge the real estate. A case of alleged legal debt may be so clear as to warrant the Court in acting on the existence or non-existence of the debt, as matter established. On the present question of legal debt I have an impression; but I cannot say that the matter is so perfectly plain and clear as to warrant me in disposing of the question, as if this were not a legal debt. I do not think I can prevent the plaintiff from establishing her debt at law, if she can.

RETAIN the bill for twelve months, with liberty to bring an action in the usual way. And if the plaintiff shall bring an action within six weeks from this day, let the defendant, for the purpose of such action, admit that the action was brought on the day the bill was filed.

1841.

Nov. 19th.

## SCAWIN v. SCAWIN.

IN February, 1830, a joint stock banking company was formed at York, and by the deed of settlement it was provided that the capital should consist of 50,000 shares of stock bank, in £100 each, and that no person should hold more than 100 shares, till the annual meeting in 1831, at which time the number of shares tenable by each share-holder should be increased to 200. There was also a stipulation that the number of shares subscribed for, or holden by each holder, should be written opposite his name, and a certificate delivered to him as to the number of shares holden by him, which should be evidence of the number of shares so holden by him.

The plaintiff subscribed 100 shares in his own name, and 50 shares in the name of his son; and he paid the deposits and calls, not only on the 100 shares, but the 50 The last call was in May, 1835.

On the occasion of this subscription, the certificates of the two classes of shares were delivered to the plaintiff; and he received the dividends on both, without any interference on the part of the son, until the 2nd June, 1887. Soon after that time the son died, having made his will, by which he appointed his wife, the defendant Sarah Scawin, his executrix, but took no notice of the shares.

The plaintiff filed his bill against Sarah Scawin and the bank, praying a transfer to him of the 50 shares, on the ground that they were purchased by the plaintiff in the name of his son, in the character of trustee for the plaintiff.

The bill put in issue, and the plaintiff proved by the evidence of his daughters, various admissions by the son, in his lifetime, that the 50 shares were not his, but his father's.

The defendant's counsel read the evidence of Barnes, N. C. C. VOL. I.

The purchase by a father. of shares in a joint the name of his son, held, under the circumstances, not to be an advancement for the son.

Evidence of declarations coupled with

Parol evidence as to the intentions of a testator by the attorney who made the will.

SCAWIN SCAWIN. the secretary of the bank, to shew that, when the certificates were delivered to the plaintiff, no direction was given by the son that the dividends should be paid to the father. They also tendered in evidence—first, a simple declaration by the son, that he had 50 shares in the York bank, and thought he could not mend himself; Grey v. Grey (a), Sidmouth v. Sidmouth (b); this was rejected: secondly, declarations to the same effect, accompanied with an offer of sale of the shares; this was received: and thirdly, the evidence of the attorney who made the son's will, stating the testator's intention to bequeath the 50 shares with the rest of his property; this was received with some hesitation.

Mr. Simpkinson, and Mr. Wilbraham, for the plaintiff, contended, that, independently of the admissions, the circumstances of this case were inconsistent with the notion of any intended advancement to the son.

Mr. Swanston, and Mr. Beales, for the defendant, Sarah Scawin.—The purchase of the shares in the name of the son was presumptively an advancement, and the payment of the calls, and the possession of the certificates by the father, are not circumstances sufficient to rebut that presumption. The payment of calls was merely paying the price of the shares, and the possession of the certificates is only the possession of the title-deeds. The receipt of dividends has the same legal effect. [The Vice-Chancellor-Upon the principle laid down in Merless v. Franklin (c), the receipt of dividends by the father is a circumstance in his favour, though not conclusive.] The question here is, on which side the weight of evidence preponderates. side of the plaintiff, two of the witnesses are his daughters. who may become entitled to receive the shares.

<sup>(</sup>a) 2 Swanst. 594; see 2 Ves. & B. 52. (b) 2 Beav. 449. (c) 1 Swanst. 13.

other side, the witnesses are wholly disinterested. Besides, the subsequent declarations and subsequent acts in favour of the father, will not give the father a title which he had not at the commencement of the transaction. Now, here the certificates were delivered without any direction on the part of the son. On the other hand, in Sidmouth v. Sidmouth, the son went and delivered the dividends to the father, and the Court, in its judgment, dwelt very much on that circumstance.

SCAWIN SCAWIN.

Mr. Witham, for the bank.

Mr. Simpkinson, in reply, was stopped by the Court.

The Vice-Chancellor.—If I decided in favour of the defendant, I should hold that a father could in no case make his son a trustee for him. It is settled that a purchase by a father in the name of his son, is prima facie an advancement of the son. The presumption is so, but of course this presumption may be rebutted. The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title-deeds and the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult. Mr. Swanston ingeniously calls the payment of calls the price of the shares; but I must confess I think the subsequent payment of calls carries the case farther than the mere payment of the price at the time of the purchase would do.

Now, what is the evidence on the other side? Nothing, except that the son quarrelled with the father, and offered to sell the property, which for want of the certificates he could not have done, and, further, that he made his will intending to leave the shares to his wife. These facts are to be received in evidence, no doubt; but they are

SCAWIN SCAWIN. not of equal weight with facts and declarations against his own interest; and although general declarations are not altogether satisfactory, and I receive them with great caution; yet, when I look at the nature of this transaction, and the amount of the property, it is impossible for me to refuse to give credit to the declarations of the son, which have been proved on the part of the father; and there is nothing, in my opinion, on the other side sufficient to counteract the effect of those declarations. Therefore, according to the known law on the subject, I think it quite consistent with the positions laid down by Lord *Eldon* to say, that I am bound in this case to hold the son a trustee for the father.

His Honor afterwards observed, in disposing of the costs, that the bank need not have been made a party.

Nov. 20th.

A father, by will, directed

that his son should be brought up by certain persons, whom he named guardians, in the Roman Catholic faith. The fortune left

to the child by the father was very small, and he was maintained alternately by Roman Catholic and Protestant relations, without any interWITTY v. MARSHALL.

WILLIAM WITTY, by his will, gave all his personal estate upon certain trusts, for the benefit of his two sons, Nicholas and William, and directed as follows:—"Whereas I am desirous that my said sons, Nicholas and William, and all other such children as my wife may be pregnant with at my death, should be educated in the Boman Catholic faith, in which I live, and which I believe to be the true faith; now I hereby constitute and appoint my wife Jane Witty, and my brother Richard Witty, and Robert Henry Anderson, to be the guardians of my said children; and I injoin the said Jane Witty, Richard Witty, and

ference on the part of the guardians, till he was about fifteen, when the Protestant relation with whom he lived died. It appeared, that he had been brought up principally as a Protestant; and it was alleged, that he preferred the Protestant faith. The Court, under the special circumstances of the case, undertook to see the infant before making an order as to the mode of his education and maintenance.

R. H. Anderson to cause my said two sons to be educated in the Roman Catholic faith."

The testator survived his son Nicholas, and died in 1827. His son William was born on the 19th June, 1826, about a year before his father's death. After his father's death, he remained under the care of his mother, who was a Protestant, and who afterwards married a Mr. Sherwood, until her death, which took place in 1831. He was then removed to the care of Mrs. Conyers, his paternal aunt, a Roman Catholic, and remained with her till her death in 1834, when he was taken into the family of Mr. Dickon, his maternal grandfather, who was a Protestant, and continued to live with Mr. Dickon till April, 1841, when Mr.

It appeared that the whole property which the infant William Witty was entitled to under his father's will, amounted to no more than £65. Under the will of Mr. Dickon, he was entitled to £2,000; and, under that of his step-father, Mr. Sherwood, lately deceased, to £300.

Dickon died.

The question was, in what religious faith the infant was to be brought up, regard being had to the strict injunctions contained in his father's will on the one hand, and the degree of education which he had already received on the other hand; and it was suggested that consideration should be given to the benefits which he had received under the wills of his Protestant relations, compared with the small amount of fortune which he had derived from his father.

With respect to education, it did not appear in what manner he had been instructed while with Mrs. Conyers; but he was then of very tender years. It was, however, in evidence, that, while at Mr. Dickon's, he read the Bible daily, both in the morning and the evening, to his aunt, Miss Dickon, the daughter of Mr. Dickon; and was in the habit of going with her occasionally to church, and at other times to a Presbyterian chapel; the Dickons being nomin-

WITTY v.

WITTY 5.
MARSHALL.

ally members of the Church of England, but inclined to Presbyterian notions.

It appeared that Richard Witty, who was a Roman Catholic, never interfered in the guardianship, and died some time since. Anderson, who was also a Roman Catholic, took no part in the education of his ward, until after the death of Mr. Dickon, and the occasion of Miss Dickon's marriage with Mr. Marshall, when that lady, having proposed to place the infant at school with a clergyman of the Church of England, Anderson, as the surviving testamentary guardian, objected to the plan.

A petition was now presented to the Court, praying a reference to the Master to ascertain the particulars of the infant's fortune, and to settle a sum for his maintenance, and to approve of a proper scheme for his education. On the hearing of the petition, several affidavits were read stating the above facts. It was also stated at the bar, that the infant had expressed a strong desire to be brought up in the Protestant faith.

Mr. Swanston, and Mr. Cole, for the petition, contended, that if the guardians had been desirous of carrying the father's wishes into execution, they ought to have taken earlier steps to have the infant brought up in the Roman Catholic faith; that though no doubt the Court would be anxious to attend to a father's wishes as to the education of his child, yet here the exercise of the jurisdiction of the Court would depend on another principle, namely, regard to the party's substantial and permanent welfare; that a change of faith, at the age at which the infant had arrived, would be most injurious to his religious and moral habits, and might, ultimately, lay the foundation of scepticism; and that, in this case, though the infant might be no theologian, (and it was not probable he should be so), yet he was evidently a person of determined habits and principles;

and it would be dangerous to attempt to shake those principles. They referred to Lyons v. Blenkin (a). They also commented on the state of the infant's fortune.

WITTY

MARSHALL

Mr. Smythe, for Mrs. Marshall.

Mr. Spence, and Mr. James Russell, for Mr. Anderson.—The degree of fortune which the infant may have from certain relations, ought not to be taken into account in a question of this nature. In Talbot v. Lord Shrewsbury (b), the observations of Lord Cottenham on that subject are very pointed. Mr. Anderson was perfectly justified in not interfering in the education of the infant during the lifetime of Mr. Dickon; for, had he done otherwise, he might have been the means of injuring the temporal prospects of the infant; and he might fairly consider the infant too young, antecedently to the present time, to have his attention directed to the peculiar faith which he was to profess. Mr. Anderson, however, is perfectly willing to leave the question to the decision of the Court.

The counsel for all parties expressed a wish, that the Vice-Chancellor would see the youth, and ascertain from him personally, what his inclinations were on the subject of religious faith.

THE VICE-CHANCELLOR.—This is a case in which there must be a reference of some kind. If the infant has a legal guardian, and it is probable he has, it is not suggested that any other person than Mr. Anderson fills that character. The infant's surviving parent, and who was one of his guardians, appears to have died while he was under six years of age. Whether Richard Witty, the other guardian, was or was not living at that time, does not appear; but he is now dead, and it is not suggested that

<sup>(</sup>a) Jacob, 245.

<sup>(</sup>b) Law Journal, N. S. Vol. 9, p. 125.

WITTY 7.

he ever interfered in the care or education of the infant. As to Mr. Anderson, he never appears till this year to have interested himself in the care or education of the infant: and the will, so far as it relates to the guardianship, appears, in a great degree, from 1831 to the death of Mr. Dickon, to have been practically a dead letter. Nevertheless, such rights and powers as belong to the legal guardianship, may yet be exercised by Mr. Anderson. If he is still the legal guardian, there is no reason to suppose he has deprived himself of his legal rights and powers. In a case, however, in which, for a long course of years, the infant's education has devolved upon others, without the interference of the legal guardian, it is impossible to say that there are not grounds for a reference, especially where it appears that the person of the infant is not in the guardian's care. That a reference, therefore, should be directed to ascertain who is the legal guardian of the infant, is, I think, clear.

Upon the other part of the case, the course which has been taken is unfortunate. It appears that the father of the infant, his lawful father, was a Roman Catholic. Not only so, but, by his will, he has left strict injunctions that his son should be educated in his own religion. It appears to me, therefore, that it was the duty of all who had the care of the infant to cause him to be brought up in his father's faith. am of opinion, therefore, that however well intentioned the parties might be, the non-compliance with the father's injunctions was a breach of duty both towards the father and the infant himself. I can well understand the motives of Mr. Anderson in not having come forward at an earlier period. He might have thought that his doing so would possibly have interfered with the infant's temporal prospects. At the same time I think, that he might, both with delicacy and respect, have communicated with Mr. Dickon. and have submitted to him the necessity of the infant's being brought up in his father's religion. On the other

hand, this duty was equally incumbent on the relatives of the mother. I see no reason to think, that they were not actuated by the best of motives; but the relatives of the mother did not keep faith with the dead. They might have brought up the infant in the religion of his father, consistently with kind care and attention, and consistently with his residence in a Protestant family. This, however, has not been done, and it is alleged that the infant has been allowed to arrive at an important period of his life under Protestant impressions.

With every respect, therefore, for what may be allowed to the feelings and wishes of the father on so important a subject, it is impossible not to see that great danger to the spiritual welfare, and to the moral character of the infant, may arise, (I do not say will arise), from a change of religious education. On this ground, and this ground alone, it is the duty of the Court to pause. Circumstances may no doubt occur, which may render a different course of proceeding necessary; but regularly, and, I think, more beneficially, these matters are sent to the Master's Office. The same sort of questions are better discussed there, and with greater care for the feelings of the family, than can be secured in a public discussion. Rarely can the Court, with propriety, withdraw such questions from the Master. I cannot help, however, seeing, that probably the matter will ultimately be brought back to the Court, whatever may be the opinion of the Master. I cannot help looking at the small amount of the infant's property; and I am desirous, if possible, to save expense. Therefore, as I understand that it is the wish of all parties that I should see and converse with the infant, I shall do it with this view, namely, for the purpose of stating, for the information of the Master, but not necessarily for his guidance, the impression which may have been made on the Court, (if any shall be made), as to the proper course to be taken with reference to the religious education of the infant.

WITTY

MARSHALL.

1841.

Nov. 22nd.

JELLICOE v. PRICE.

٠.:

In a suit against an agent, the Court will not, at the hearing (except in an extreme case), direct payment of the costs up to the hearing, but will reserve the question of costs till further directions. THE defendant, a solicitor, had been for many years trustee, receiver of rents, and agent for a Mrs. Scott; and the bill was filed against him by the personal representative of Mrs. Scott, praying accounts, and that he might be charged as for wilful default.

The defendant by his answer admitted, that a mortgage amounting to £900, part of the trust fund, having been paid off, he and his father, who were in partnership as solicitors, had received the money, and that part of that sum, namely,£300, had been employed by them in their business. He also admitted that the other trust-monies were received by the firm. It also seemed clear from the answer, that he had delayed for twelve months to render any account to the plaintiff.

At the hearing of the cause, the Court having directed accounts to be taken of all sums received by the firm or the defendant, by virtue of the trust deed, and of all sums received by the defendant and his father, or either of them, as agent or agents of Mrs. Scott, and having directed a special inquiry as to the manner in which the £900 had been disposed of—

Mr. Simpkinson, for the plaintiff, asked for the costs of the cause up to the hearing, observing, that in cases of agents, non-production of accounts coupled with non-compliance with requests to make out the accounts, gives the Court authority to award costs to the hearing: Collyer v. Dudley (a), Anon. (b).

Mr. Kinglake, contrà.

THE VICE-CHANCELLOR.—In each of the cases cited,

(a) Turn. & Russ. 421.

(b) 4 Madd. 271.

the matter was disposed of on further directions; and upon further directions, the matters which have been adverted to as to non-delivery of accounts, may have material weight. But I cannot avoid seeing, that, giving that conduct its fullest effect in the plaintiff's favour, the consequences of it may be materially varied, either by the length or the perplexity of the accounts, (which I cannot at present know), or the difficulty of obtaining vouchers or proving balances. I think, therefore, I shall be more likely to do complete and satisfactory justice as to costs. when these facts are known. On that ground alone, and not on the ground of disapproval of those cases, I reserve the costs. The point will be open on further directions.

1841. JELLICOE ø. PRICE.

## SMITH V. SPENCER.

MARY Carter being seised in fee of an estate at Dalton, Bill by devisees in the county of York, in 1835 intrusted Mr. Tomline, a solicitor, to make her will. Accordingly, a will was prepared by him, which was duly published by the testatrix, in testator's will, 1835, and by which she devised that property in thirds to her three sisters, for their respective lives, with respective remainders to a nephew and certain nieces in fee. two years previous to the death of the testatrix, the de-but the plainfendant John Spencer, who was her nephew and heir-at-law, and who was not named in the will, resided, together with his wife and children, at her house, and they were there at had existed, and the time of her death, which took place in September, 1888. of the testatrix Dorothy Grey, one of the sisters of the testatrix, also lived in the house, but was absent on a visit at that particular time. Upon the death of the testatrix, the defendant took possession of the property.

Nov. 22nd.

against an heirat-law, alleging suppression by the heir of the and praying delivery up of the premises. No case of suppres-For sion was made at the hearing, tiffs shewed distinctly that the will under which they claimed was in the house within two years before her death, during which two years the heir-at-law, with his family, had been living in the house :-

Held, that this was a case for an inquiry, and for an issue as to whether the testatrix did devise the lands in manner alleged.

SMITH U. SPENCER.

The bill was filed by the sisters, and the other devisees under the will, against the defendant, alleging that he had suppressed the will, and praying that, in case the will should not be forthcoming, he might be declared a trustee for the plaintiffs, and might deliver up possession, to them, and that an occupation rent might be set upon the premises for the time he had been in possession, and that he might account for the rents and profits during that time, and might pay what was due and deliver up the title-deeds; and in case the will was forthcoming, then, that it might be established, and the trusts carried into execution.

The defendant, by his answer, denied that the will of 1835 was the last will of the testatrix, inasmuch as she had duly executed a will dated the 17th January, 1837, by which she had left her real estate to him for life. stated that this latter will was in the hands of his solicitor, and submitted, that, as the plaintiffs had not proved their title, he was not bound to produce it. He denied all knowledge of the will of 1835, but he stated, that, two years before her death, the testatrix requested him to come and live with her; saying, at the same time, that she had made her will, but if he would come and live with her, she would leave him every thing. Whether this related to the will of 1885, the defendant did not know. He admitted that he and his family were the only persons living in the house at the time of the death of the testatrix, but he stated that, when she was dying, three neighbours were sent for to attend her, namely, Jenny Collings, Mary Dunn, and William Dunn, the husband of Mary Dunn. That on the morning after the testatrix's death, the defendant, in the presence of William Dunn, opened the bureau of the testatrix, and took out the will of the 17th January, 1837, which was lying there with her husband's will.

The cause came on for hearing, and in support of the

1841.

SMITH

SPENCER.

case made by the bill several witnesses were examined, who spoke to conversations with the testatrix since January, 1837, in which she mentioned having left her property to the plaintiffs. One of the witnesses swore, that, in reply to a question whether she meant to leave Smith anything, she said, "Not a halfpenny." Another stated that the testatrix had frequently said it was her duty to leave her property to her sisters. And a third spoke to a long conversation with the testatrix in October, 1837, when she produced from her bureau the will made by Tomline, and a long discussion ensued, as to the proper means of insuring its safe custody.

No affidavit was annexed to the bill as to the lost instrument, and no evidence was given by the women, Collings and Dunn, or William Dunn, as to the will found in the house.

Mr. Simpkinson, and Mr. Wilcock, for the plaintiffs .--If a presumption can be raised, that the defendant has suppressed the will, then the principles of Hampden v. Hampden (a) will apply. There, the heir at law suppressed the will, and the devisees prayed the same relief as the present. A decree was pronounced that they should hold till the will was forthcoming; and the Court held, in odium spoliatoris, that the bill was a real statement. On appeal to the House of Lords, the decree was affirmed (b). Woodreff v. Burton (c); Finch v. Newnham (d). In those cases. the Court did not send the question to law. It is clearly established, that where there is suppression, as well as where there is spoliation, it changes the jurisdiction, and gives a right to this Court to try that which otherwise would only be the subject of ejectment: Rex v. Lord Humsdon (e); Tucker v. Phipps (f). As to personal estate,

<sup>(</sup>a) 1 P. W. 733.

<sup>(</sup>b) 3 Bro. P. C. 550.

<sup>(</sup>c) 1 P. W. 734.

<sup>(</sup>d) 2 Vern. 216.

<sup>(</sup>e) Hob. 109.

<sup>(</sup>f) 3 Atk. 360.

<sup>).</sup> As to perso

SMITH F. SPENCER.

Garland v. Radcliffe (a), Hayne v. Hayne (b), and Dalston v. Coatsworth (c), are in point. At all events, there is a case for inquiry. Considering the possession taken by the defendant of the house and all its contents, and that he has entered into no evidence of search, the presumption is, that he has concealed the will of 1835.

Mr. Cooper, and Mr. Bichner, for the defendant; (after observing that no affidavit was annexed to the bill).—The jurisdiction is not disputed; but the plaintiffs are bound to prove such a case as is sufficient to authorize the Court to exercise jurisdiction. It is sufficient for the defendant to examine witnesses to prove the subsequent will, and to shew that the will of 1835 never came to his knowledge or possession. The Court is not in the habit of directing such an inquiry as is now sought for, unless there is some evidence of suppression. There is no evidence of that sort, unless the fact of the defendant's having lived in the house of the testatrix for two years before her death amounts to such. Why have the plaintiffs not examined the women, Collings and Dunn, or William Dunn? If they wished to establish a case of suppression, those persons probably would have been useful witnesses. There is, therefore, no prima facie case. But, even if there had been, it is removed by the will of 1837, which revokes all former wills, and it must be taken, until there is evidence to the contrary, that the person who made that will destroyed the former will.

THE VICE-CHANCELLOR.—The plaintiffs in this case have not, I think, established a case of spoliation or suppression against the defendant. But the question is, whether the circumstances of the case are not sufficient to call upon the Court to direct an inquiry on the subject.

(a) Dick. 15.

(b) Id. 18.

(c) 1 P. W. 731.

Upon that point I have had some hesitation; but after hearing the whole of the argument, and the evidence. I have come to the conclusion, that the bill ought not to be dismissed. An observation has been made, and very properly made, upon the circumstance of the omission of any affidavit annexed to the bill, with reference to the absence of the possession of the document in question. That is a circumstance of which I apprehend advantage could only have been taken by demurrer; and, indeed, it has not been contended by the defendant, that, in the present stage of the cause, that would be a ground for dismissing the bill. does not appear in this case very probable that the document exists. The defendant does not admit its existence the plaintiffs have it not, though they suggest that it is in the possession of the defendant, or that he knows what has become of it. It may be so; but whether the instrument has or has not been suppressed by the defendant—whether his conduct has or has not been suspicious in this particular—the absence of it may render the present a fit case for the exercise of the jurisdiction of the Court. In this case, there is no doubt that such a will, as has been alleged to have been made, was made in 1835. There appears no doubt, that it was at one time in the possession of the testatrix. There is no proof that that will has, in any manner, been destroyed. There is evidence more or less accurate, that the will was not only in the testatrix's possession after January, 1837, but that it was recognised by her as a subsisting will after 1837. The weight to be given to this evidence is one thing; the admissibility of it to shew the existence of the instrument is another. At the death of the testatrix, the heir-at-law, who alleges himself to be devisee, is living together with his family in the house of the testatrix. None of the devisees under the will of 1885, were apparently there at the time. Three neighbours were called in at her last illness, when she was gradually sinking, (and it appears that they never left her till her death)-two

SMITH

SPENCER.

SMITH V.
SPENCER.

women, of the names of Collings and Dunn, and William Duan, the husband of one of them. It is singular that, upon a question whether the will in the house at the death of the testatrix was improperly dealt with, neither party should have examined the women—and though the husband is examined, neither party should have examined him on this point. On the evidence it does not appear improbable, that the will of 1835 may have been in the house at the death of the testatrix; and considering that complete possession of the house and all that it contained, which the defendant appears to have had, this is not a case, in my opinion, to be dismissed without a further inquiry.

The first issue, therefore, which I propose to direct, is not an issue containing the proposition of fraud, as in Barker v. Ray (a), but simply whether, by a will dated in 1835, duly executed and attested so as to pass real estate, Mrs. Carter did devise her real estates in the manner alleged. To that issue, I apprehend (the proper course being taken for that purpose), a clause may be added, that secondary evidence of the will may be receivable. Supposing the jury to find such a devise was made, then, I propose a second issue, devisavit vel non, of the will of January, 1837, with the usual directions.

Dec. 9th.

THE VICE-CHANCELLOR afterwards, having regard to the extent of the property, and to other circumstances in the case, thought fit to vary his decree, and decreed as follows:—

RETAIN the bill for twelve months, with liberty to the plaintiffs to bring such action as they may be advised, the defendant undertaking not to set up any outstanding legal estate in bar to any action which shall be commenced before the end of Hilary Term next.

1841.

Between John Skerrette Stubes, Thomas Bury, and EDWARD CONNELL and MARY HARDIE, Plaintiffs; and JAMES LISTER. Defendant.

Nov. 17th.

IN May 1835, a Joint-Stock Banking Company was By one of the established at Liverpool, under the style of the Liverpool Union Bank, and the defendant, James Lister, was appoint- the formation of ed one of the public registered officers under the provisions banking comof the statute 7 Geo. 4. By a deed of settlement dated the 1st day of May, 1835, made between the shareholders of the company and certain trustees appointed by them, it by or on the was stipulated and agreed that the capital of the company should be £600,000 divided into 30,000 shares of £20 each, with a power to add to the capital of the company the sum of £400,000 by the creation of 20,000 new shares all cases be the of £20 each in the manner therein mentioned. number of shares holden by each person, with his place of all the shares abode and addition, should, at the time of his executing such proprietor: the said indenture, be written opposite to his name in the wereempowered schedule thereto subjoined, and that no person should, in tinguish, and dehis own right, be allowed to subscribe for or hold, so long as the total number of shares of the company should be dispose of such

clauses in a deed of settlement on a joint stock pany it was provided, "that all debts due to the Company part of any proprietor in respect of cash advances or otherwise, should at all times and in first and para-That the mount lien on and the directors to cancel, exclare forfeited, or to sell and shares, either wholly or in

part, as the case might require, by way of or towards satisfaction or liquidation of such debts; and that every such person should thenceforth cease to be a proprietor of the Company, or to retain any interest therein in respect of the shares so cancelled, extinguished, and declared to be forfeited, or so to be sold or disposed of as aforesaid." A holder of 1000 shares being indebted to the bank for cash advances, a notice dated the 30th May, 1837, was given to the shareholder, that unless he redeemed the 1000 shares by payment of the balance of his account with the bank on or before the 13th day of June, the directors would on that day proceed, under the clause of the deed of association, to cancel and extinguish, and declare his shares for-feited, and to place the value of the shares on that day to the credit of his account with the bank. The balance not being paid, the directors by a resolution declared the shares to be cancelled and forfeited, and it appearing to them that the value of the shares on that day was £10,000, it was resolved that credit should be given to the proprietor for that amount in his account.

A bill was filed to set aside the cancellation. From the evidence it appeared that the market price of shares, on the 13th day of June, slightly exceeded the price allowed by the directors, but the evidence proved, that, if the 1000 shares had been carried into the market, the price would have been reduced greatly below the amount allowed by the directors:—Held, that the directors placing themselves by the cancellation in the situation both of vendors and purchasers, were bound to allow the highest market price which could be obtained for the shares, without speculating on what might be the effect of throwing the 1000 shares into the market, and the

cancellation was declared to be void, and was set aside,

STUBBS v. LISTER. 30,000, more than 500 shares, and in case the total number of shares should be increased to 50,000, then more than 750 shares. That the name and place of abode of each proprietor for the time being in the said company, together with the number of shares held by him, should from time to time be entered and written in a book to be kept for that purpose, to be called the "Shareholders' Register," and every proprietor who should at any time change his name or place of abode, or, being a female, should marry, and the assignees of any proprietor who should become bankrupt or insolvent, and the personal representatives of any proprietor who should die, should immediately upon and after any of the said events, leave notice at the banking-house or office of the said company in Liverpool stating his or her name, or new name, and place of abode.

The 51st clause provided, that, in every case in which any notice was by the said indenture directed to be given or sent to the proprietors of the company, or any meeting of proprietors was required or authorized to be convened, the same should, unless otherwise expressed, be given, sent, or convened by a written or printed letter signed by such officer for the time being of the company as the directors for the time being should appoint in that behalf; and every such letter should be directed to the person, to whom the same was to be given or sent, at his place of abode, as stated in the shareholders' register, and should be forwarded through the Liverpool post-office, and should be fully effective for all purposes for which such notice was required to be given, although the same should not, after being committed to the post-office as aforesaid, reach its place of destination, and should to all intents and purposes be considered to have been given to the party to whom the same should be directed, on the day on which the same should be committed to the post-office.

By the 58th clause it was stipulated, "that all debts, liabilities, and engagements due to and subsisting with the

company by or on the part of any and every proprietor, either in respect of cash advances or balances, or running bills or notes, or on account generally, and whether in respect of his direct transactions with the company, or mediately, or as surety or otherwise, should at all times and in all cases be the first and paramount lien on all the shares and stock of such proprietor, whether such debts and engagements were those of such proprietor solely, or jointly or in partnership with any other person or persons; and the directors for the time being were thereby empowcred to cancel and extinguish and declare forfeited, or to sell and dispose of the shares of such proprietors, either wholly or in part, as the case might require, by way of or towards satisfaction or liquidation of all or any part of such debts, liabilities, or engagements, and that every such person should thenceforth cease to be a proprietor of the company, or to retain any interest therein, in respect of the shares so cancelled and extinguished and declared to be forfeited, or so to be sold or disposed of, as aforesaid.

In and prior to July, 1885, James Hardie, deceased, and Herbert Hardie carried on business as merchants and commission-agents in copartnership at Manchester, under the style or firm of J. & H. Hardie, and, as such partners, they became possessed of 1000 of the shares in the said Joint-Stock Banking Company, and purchased and paid for the same shares out of their partnership monies; and such shares formed part of the partnership property and effects of the said James Hardie and Herbert Hardie: but by reason of the stipulation and provision contained in the deed of settlement, by which shareholders of the said Company were prohibited from holding more than 500 shares each, 500 of the 1000 shares so purchased by James Hardie and Herbert Hardie were registered and stood in the books of the said Company in the name of James Hardie, and the remaining 500 of the same 1000 shares were registered and stood in the same books in the name of Herbert Hardie.

STUBBS V. LISTER. STUBBS v. LISTER.

James Hardie and Herbert Hardie executed the deed of settlement, and out of their partnership monies paid up the several calls or instalments which from time to time were demanded by the Company upon or in respect of the said 1000 shares; which calls or instalments amounted in the whole to 101. upon each share. In July, 1835, James Hardie and Herbert Hardie, as such copartners as aforesaid, opened a banking account with the Liverpool Union Bank; and, from the month of July, 1835, until the bankruptcy of Herbert Hardie, such banking account was, and continued to be, kept with the bank in the name of the firm of J. & H. Hardie; in respect of which banking account James Hardie and Herbert Hardie became indebted upon the balance thereof to the bank. Hardie died on the 25th March, 1837, intestate, leaving Mary Hardie, his widow; and letters of administration of his estate and effects were granted to her. Herbert Hardie. subsequently to the decease of James Hardie, and as the surviving partner of the firm, continued to carry on the said business of a merchant and commission-agent at Manchester, under the said style and firm of J. & H. Hardie, and so kept and continued to keep the said banking account with the Liverpool Union Bank up to the 6th day of May, 1837, when a fiat in bankruptcy was issued against Herbert Hardie, and he was thereunder duly found and declared a bankrupt, and the plaintiffs, John Skerrette Stubbs, Thomas Bury, and Edward Connell, were chosen and appointed assignees of his estate and effects. The Liverpool Union Bank claimed to be creditors of the said Herbert Hardie, as such surviving partner as aforesaid, in respect of the balance then due on such banking account, and for which the said Herbert Hardie and James Hardie had, in the lifetime of the said James Hardie, deposited with the said Liverpool Union Bank divers shares in divers other joint stock banks, and other effects; and the Liverpool Union Bank also claimed, under and by virtue of the deed of

settlement, to have a lien on the said 1000 shares so standing in the respective names of the said James Hardie and Herbert Hardie as aforesaid, as a further security for such balance.

STURBS TO.

On 1st June, 1837, a letter, addressed to Messrs. J. & H. Hardie, or their representatives, was received in Manchester by Mr. Jonathan Lees, the accountant of the said bankrupt's estate, and was by him handed to the plaintiffs, J. S. Stubbs, Thomas Bury and Edward Connell, as such assignees as aforesaid, which letter was of the date and in the words and figures following, (that is to say):—

## "Liverpool Union Bank, Liverpool, 30th May, 1837.

"Gentlemen,—I am instructed by the directors of this bank to inform you, that unless you redeem the 1000 shares in the bank now standing in your respective names, by payment of the balance of your account with the bank, on or before the 13th day of June, at noon, the Directors will on that day proceed, under the 58th clause of the deed of association, to cancel and extinguish, and declare your shares forfeited, and to place the value of the shares on that day to the credit of your account with the bank.

(Signed) "JAMES LISTER, Manager."

On the 1st of June, 1837, Messrs. Seddon, Mawson & Lycett, the solicitors to the fiat against Herbert Hardie, sent a letter of that date to the defendant, James Lister, requesting a copy of the bankrupt's account with the bank, in order to its being examined, and put in a train for a settlement. In reply to that letter the defendant, Lister, on behalf of the bank, addressed and sent to Messrs. Seddon, Mawson & Lycett, a letter dated the 2nd day of June, stating that Mr. Hardie was at the bank the preceding day, and took his bank-book with him regularly posted up to the date of the commission, which he would no doubt hand to the assignees. On the 25th June, 1837, a letter signed by James Bavis, the submanager of the Union Bank, directed to Messrs. J. &

STUBBS 5. LISTER. A. Hardie, or their representatives, was delivered to the plaintiffs from the Manchester post-office, to the following effect:—

"Gentlemen,—I am instructed by the directors to inform you, that, at their meeting held on the 20th day of June, the 1000 shares standing in your name, were cancelled and extinguished, and declared forfeited to the company, and that the sum of £10,000 is placed to the credit of your account with the bank, as the value of the shares on that day."

Divers subsequent communications took place between the plaintiffs and the defendant, James Lister, as such manager as aforesaid, but no satisfactory conclusion was come to. The whole amount due to the Liverpool Union Bank, from the firm of J. & H. Hardie, on and up to the 16th of July, 1838, was 11,540l. 14s. 8d., inclusive of the sum of £10,000, for which the bank gave credit, as stated in the last-mentioned letter. On the 16th day of July, 1838, the plaintiffs tendered to James Lister the sum of 11,540l. 18s. 8d., and at the same time called upon and required him, as such manager as aforesaid, to transfer and deliver up to the plaintiffs, as such assignees as aforesaid, all the shares and other securities held by the bank, in respect or on account of the debt, and at the same time delivered to James Lister the following notice in writing, (that is to say):—

"To the Directors and Manager of the Liverpool Union Bank.

"Take notice, that the assignees of the estate and effects of Herbert Hardie, of Manchester, in the county of Lancaster, merchant and commission-agent, dealer, and chapman, (surviving partner of James Hardie, deceased), do hereby, with the consent and approbation of the administratrix of the said James Hardie, declare their willingness to pay off and discharge all monies owing by the said James Hardie in his lifetime, and the said Herbert Hardie,

or either of them, to the said bank, with interest, commission, and charges up to this day; and do hereby tender you the sum of 11,540l. 14s. 8d., in satisfaction of the amount so owing, and declare that if that sum be not the full amount owing, they are ready, and now offer to pay the full amount on the same being stated by you: and the said assignees do hereby request and call upon you to restore the 500 shares in your bank lately standing in the name of the said James Hardie, and the like number of shares lately standing in the name of the said Herbert Hardie, and which shares were, in or about the month of June, 1847, cancelled, or pretended to be cancelled, by you; and you are also requested to pay or give credit for all the dividends which have been, or ought to have been. declared on the said shares standing in the name of Elizabeth Hardie, and which are the property of the said assignees, and to deliver up all bills of exchange and securities held by you on account of the amount due; and in default of your compliance with this request, you will be held responsible for all the said shares according to the market value thereof this day, or such increased value as the same may hereafter attain, and for any loss which may accrue on any bills of exchange, or securities.

(Signed) "E. Connell, Manchester, 15th July, 1838. "for Self and Assignees."

The defendant, James Lister, refused to receive the money so tendered, or to transfer or deliver up the shares and securities, and delivered to the plaintiffs the following notice, (that is to say):—

"Liverpool Union Bank, Liverpool, 16th July, 1838.

"To the assignees of Herbert Hardie. Gentlemen,—I do hereby give you notice, that the directors of the Liverpool Union Bank are ready to receive the balance of account owing to them, viz. 1787l. 19s. 2d., including interest to this date, and on the receipt thereof to hand over to you the securities they now hold; but the Directors

STUBBS v. STUBBS

v.

LISTER.

cannot comply with your request to restore the shares lately standing in the names of James Hardie and Herbert Hardie, and which were cancelled according to the deed of settlement, as has been already notified to you.

" (Signed) JAMES LISTER, Manager."

The whole sum demanded by the bank, in respect of their debt from the firm, up to the 3rd day of October, 1838, was 17061. 8s. 1d. And on that day the plaintiffs paid to the defendant, James Lister, as such manager, such sum of 17061.8s. 1d., under the following protest, (that is to say):—

"To the Directors and Manager of the Liverpool Union Bank.

"WE, the undersigned, being solicitors for the assignees of the estate and effects of Herbert Hardie of Manchester, in the county of Lancaster, merchant and commissionagent, dealer and chapman, (surviving partner of James Hardie, deceased), do hereby for and on behalf of the said assignees, and of the administratrix of the said James Hardie, give you notice, that the sum of 1706l. 8s. 1d. now paid by us to you, as the balance of the account owing to you by the said James and Herbert Hardie, is so paid under protest, and saving all right of the said assignees and administratrix to 500 shares in your bank lately standin the name of the said Herbert Hardie, and 500 shares lately standing in the name of the said James Hardie, and which shares were, in or about the month of June, 1837, cancelled, or pretended to be cancelled by you; but that the said assignees and administratrix do dispute your right to cancel the said shares; and that the said payment, now made as aforesaid, is not to be considered as any acknowledgment on their part of your right to cancel the said shares. Dated this 3rd day of October, 1838.

"SEDDON, MAWSON & LYCETT."

The bill was filed on the 31st day of December, 1838, and prayed a declaration that the cancellation of the said 1000 shares was fraudulent and void, and that the plaintiffs

might be declared to be entitled to the shares. bill also prayed an account of the dividends which on and from the 20th of June, 1887, were or had become due, or which, but for such cancellation, would have become due, upon or in respect of the shares; and that the bank might be ordered and decreed to pay or allow to the plaintiffs in account the full amount of such dividends: and that, upon the plaintiffs' paying, as they offered to do, to the Liverpool Union Bank the said sum of £10,000, with interest thereon, deducting therefrom the amount of such dividends as aforesaid, the Liverpool Union Bank might be ordered and decreed to transfer to the plaintiffs the said 1000 shares, or that the said shares might be sold in such manner and at such times or time as the Court should think fit to direct, and that the proceeds of such sale might be paid to the plaintiffs; or that it might be ascertained what was the true value of the 1000 shares on the 16th day of June, 1838, and the amount of the dividends which had then accrued or would have accrued due thereon; and that the defendant might be ordered to account for and pay to the plaintiffs such value and amount.

From the answer it appeared, that the shares of the Liverpool Union Bank attained their maximum price about twelve months before the bankruptcy of Herbert Hardie, when the selling price was 181. 10s. per share, being a premium of 81. 10s. per share beyond the amount of calls which had been paid thereon; and from that period they gradually fell till the bankruptcy, at which time the nominal price per share was 111. 10, or 11. 10 premium. The answer, however, stated, that if 250 shares had been thrown into the market at that time, the market price would have been at par, and that if 1000 of the shares had been thrown into the market, the price of shares would have been at a discount, and the 1000 shares must necessarily have been sold at a great loss. The answer further stated, that, during the whole of the month of June, 1837,

STUBBS 9. STUBBS 5. LISTER. and at the time when the 1000 shares were cancelled, the market price of the shares was lower than at the time of the bankruptcy. That on the 16th July, 1838, when the tender was made by the plaintiffs in respect of the debt due to the bank, the market price of the shares was 131, 10s, per share; and that, on the 3rd October, 1838, when the plaintiffs paid the balance due to the bank, the market price was 131.5s. per share. The defendant contended that the notice of the intended cancellation of the shares was in the usual form, and gave the usual time allowed to parties to pay off their debts before the sale or cancellation of their shares, and was addressed to James and Herbert Hardie, as the registered shareholders, at the place of abode as stated in the shareholders' register, or to their representatives, and was forwarded through the Liverpool post-office, as provided by the 51st clause of the deed of settlement. The answer insisted that the plaintiffs had the means and opportunity from the pass-book of knowing the state of the account between the bank and J. & H. Hardie. The answer also stated that the full value of the shares held by James & H. Hardie on the 20th June, 1837, at the market price, including the right to dividends, was £10,000. That, at a meeting of the directors on the said 20th June, 1837, the shares were declared to be cancelled, and credit was given in the account of J. & H. Hardie for £10,000. That a resolution to that effect was entered on the minutes of the proceedings of the directors, and that on the 24th June, in pursuance of the 51st clause of the deed of settlement, notice that the shares had been cancelled, and the £10,000 placed to the credit of the said J. & Herbert Hardie, or their representatives, was sent through the Liverpool post-office.

The defendant, by his answer, relied on the validity of the transaction, and insisted on the propriety of the cancellation of the shares.

Both parties entered into evidence. The plaintiffs examined several stock-brokers, to prove the market-price of

the shares. The effect of the evidence was, that the market price per share on the 6th May and 1st June, 1837, was 111. 10s.; on the 20th June, 1837, £11; on the 16th July, 1838, 131. 12s. 6d.; and, on the 3rd October, 1838, 131. 5s.

STUBBS V. LISTER.

The witnesses examined on the part of the defendant were the sub-manager and clerks in the office of the bank, to prove the several books and accounts, and share-brokers, whose testimony as to the value of the shares on the particular days varied in some respects from the evidence of the share-brokers examined on the part of the plaintiffs, the witnesses for the defendant estimating the value of the shares at a few shillings per share less than the witnesses for the plaintiffs. All the witnesses, however, bore testimony to the fact, that if the whole 1000 shares had been at once thrown into the market, the price of shares would have been much depreciated.

Mr. Simpkinson, and Mr. Bacon, for the plaintiffs.—The directors were merely mortgagees of the shares, and held them as such, and they were bound to deal with them as a trustee would be required to deal with trust property, that is, to get the best price which could be ob-The defendant contends that no notice of the cancellation was necessary. The first notice, however, shews that the directors considered it incumbent on them to give notice of what they intended to do, and it is not pretended that they did not know of the title of the assignees. They nevertheless do not give any notice to the assignees, but to the representatives of J. & H. Hardie, taking the chance of the notice being delivered by the post-office to the proper parties. The notice calls on the representatives of James and Herbert Hardie to redeem the 1000 shares. The plaintiffs are entitled to consider this notice as a new contract with the assignees. It was impossible for the assignees to comply with the notice, until they knew something of the account; and the directors STUBBS 5. LISTER. refused to give any account, referring the assignees to the pass-book. The notice is also defective:—" on that day," if it means anything, means the 13th of June in any year. The evidence shews that credit was not given for the full value of the shares. The Company have taken on themselves to declare the shares forfeited; if there has been any increase in the value, they have had the benefit, and the bankrupt's estate has lost it. The plaintiffs are certainly unable to give any satisfactory explanation respecting the interval of time between June, 1837, and July, 1838, but there is nothing material put in issue on the subject.

Mr. Swanston, and Mr. Rolt, for the defendants.—The inability of the plaintiffs to account for the period between June, 1837, and July, 1838, is a sufficient answer to the case. It is proved that there was a remarkable increase in the value of the shares during that period. The policy of the plaintiffs was, to lay by during that period, and watch the progress of the market. circumstance was known to the plaintiffs in June, 1837; they nevertheless forbear to assert their right until the market rises, and they then rush in and claim the benefit. It is true, that, the answer does not put this fact distinctly in issue, and there is no distinct averment in the pleadings on the subject. It is in evidence, that, after the bankruptcy, no notice was given by the assignees of the bankrupt, or by the representative of the deceased, as required by the deed of settlement. The notice was, therefore, correctly addressed to the representatives, and was sent in the manner prescribed by the deed of settlement, and could not have misled the parties, as the 13th June could only mean the following June.

Admitting the plaintiffs to be entitled to the value of the shares, credit has been given for that value. The plaintiffs, however, insist on having more than that value; and, assuming their evidence to be conclusive, it would appear that the shares at the time of the cancellation were worth about 2s. 6d. a share more than the amount for which the directors gave credit to James and H. Hardie, but if the 1000 shares had been thrown into the market, the price would have been greatly reduced, and, therefore, credit has been given for a much larger sum than would have been realised by the sale of the shares, if thrown into the market. In Sparks v. The Liverpool Water-Works Company (a), a bye-law provided for a forfeiture by non-payment of a call after ten days' notice; and though in that case it was clear that the nonpayment of the call arose from ignorance of its having been made, from accidental circumstances, and absence from town when the notice was sent, vet relief from the forfeiture was refused. The clause of forfeiture in that case was not more stringent than in the present. It is unfair for the party to withdraw whilst there is a prospect of risk, and to come in when a profit arises, and time is necessarily of the essence of a contract in a case of this description. Doloret v. Rothschild (b),

STUBBS 9. LISTER.

The plaintiffs are bound by all the provisions of the deed, and it is not sufficient to say, that it imposes on them hardship or difficulty. The deeds were prepared expressly for the purpose of preventing bankrupts taking any interest. No notice of the forfeiture was required by the deed. A party may contract to waive or do without notice. The giving therefore of a notice which was not required, cannot prejudice the rights of the bank, whether the notice be regular or irregular. The fair construction to be given to the transaction is:—pay back the capital, or else sell and apply the purchase-money in satisfaction of the debt, and, according to this construction, the bank has acted correctly. The balance was paid on the 16th July under protest, but the protest is merely against the cancelling of the shares, not against the amount allowed for the shares.

<sup>(</sup>a) 13 Ves. 428,

<sup>(</sup>b) 2 Sim. & Stu. 590.

STUBBS 9. LISTER. THE VICE-CHANCELLOR.—[Without hearing the reply].

The two Hardies held each 500 shares in the Liverpool Union Banking Company, which appear to have been purchased with partnership monies. The bill is filed by the assignees of Herbert Hardie, who has become a bankrupt, and the administratrix of James Hardie, who had previously died. A clear title to relief appears to be made out by the bill.

The case stated on the part of the defendant is, that the Hardies being indebted to the Liverpool Union Banking Company, the directors exercised the right of cancelling the shares given to them by the 58th clause, and that they did so duly and effectually; and that the interests of the Hardies in the shares were thereupon determined and extinguished. At one period of the discussion, I felt some doubt whether, having regard to the nature of the property, the plaintiffs came in time. In Doloret v. Roths. child (a), time was held to be of the essence of the contract, where the subject of the contract was of such a nature as to be liable to variation in its value. The principle laid down in that case is a sound one. If the complaint be in due time, then the rule to be applied, in such a case, will be the rule adopted in ordinary circumstances. The alleged wrong was done in June, 1837, and the bill was not filed till December, 1838. A case might, perhaps, have been stated by the answer and have been proved, in which this delay, with other circumstances, might have been fatal to the relief sought by the bill. Delay is not, however, alone sufficient; it must be coupled with other circumstances. It must also be brought forward in such a way that the plaintiff may have an opportunity of rebutting it, and of entering into evidence to explain or to avoid the effect of it. In my view of the case, it is clear that the defendant has not rested the defence on the delay of the plaintiff. The answer, in what it puts in issue on the subject, admits, that from January, 1838, to July, 1838, the plaintiffs claimed a title to the shares. What was the value of the shares between the 24th June, 1837, and the 16th July, 1888, does not appear from any evidence. my view of the case, it was material to state and to prove this. For the first half of the year 1888 it is admitted that the demand was kept up, and then a tender of the amount is made under a protest. Though time is important, and most important when attended with other circumstances, it is nothing of itself, and I am not able to find any such circumstances stated or proved on this record as will, on that ground, deprive the plaintiffs of their right I am not satisfied with the manner in which the claim is brought forward by the plaintiffs: but I am not so dissatisfied with it as to be able to refuse the relief sought by the plaintiffs. The next question is, whether the lien could be made effectual by the forfeiture. I am of opinion that the debt to the Company is sufficiently proved. At the death of James Hardie, a debt was due, and continued to be due down to the time of the bankruptcy of Herbert Hardie. Taking the debt to be proved, the directors had a right to exercise the power given to them by the 58th clause. That clause is most singularly worded; there would not appear to be any thing which it was incumbent on the debtor to do; it merely declares, that there shall be a lien on the shares of the debtor for the amount of the debt, and that the directors shall be at liberty to cancel the shares in liquidation and satisfaction of the debt. It might reasonably have been expected, that there should have been some requisition, so as to create a default; but not so, the lien is to take effect on merely stating the debt, without stating any default. No request for payment is required, and, therefore, there Now, I admit, that if the case of can be no default. default had been provided for, it might be proper and reasonable to stipulate for the forfeiture, in case of STUBBS 9. STUBBS

U.

LISTER.

default; but to say that there shall be a forfeiture, because there is a debt without any default in the payment of it, seems to be most extravagant. Another possible view in which it might be taken is, that the forfeiture was to be an extinguishment of the debt; but then there is no amount of debt stated at which the forfeiture shall take place, and therefore shares worth 5000l. might be forfeited for a debt of 51. To render this construction available, it must be put on some certain principle, such as the amount of the debt. It was argued for the defendant, that the shares might be taken at par; but if they are to be treated as security, they cannot be taken otherwise than at their true value. I must consider, therefore, that the shares, if taken, were to be taken at their real value, and applied in reduction of the debt. The clause is easily understood in this way; viz. that the directors should not be obliged to raise by a sale of the shares, which might be injurious to the Company, the amount of the debt, but might take the shares in reduction of the debt. They had, therefore, an option, but an option to be exercised most scrupulously, as it in effect rendered them both vendors and purchasers, and gave them the power of taking the property of their debtor in satisfaction of their debt. It was an option which required the exercise of great caution and delicacy.

I will not say that the Company were not justified in resorting to this mode of cancellation of the debt; but doing so they were bound to give the full value of the shares. The question is, have they done so? It has been said, that if the shares had been thrown into the market, the price of shares would have been greatly depreciated, and the 1000 shares would have produced much less than £10,000. Such probably would have been the case, but the Company had no right to speculate on this. In my opinion, the full market value should have been credited in respect of these shares, and it is admitted, that the full market value has not been credited. It has been said, that the dif-

ference is only 2s. 6d. per share; that, however, would amount to £125: and on the evidence, it might, I think, be taken at something more, but taking it at 2s. 6d, per share only, and that £10,000 only was credited, too little appears to have been credited. Another doubt, which in the course of the case I have entertained is, whether the cancellation might not in substance take place, though credit might not be given for the proper amount. On reflection, however, I am satisfied that there is no foundation for this doubt, and that the sale must be set aside altogether. The cancellation, to be effectual, must be attended with all requisite conditions; taken as a sale, if the sale was at an improper price, the whole transaction must be set aside. Other views may, possibly, be taken—the settlement does not require notice:--to exercise this power without notice would, however, have been harsh in the extreme. usual course appears to have been to give notice, and notice was given in this case. It has been said, that though notice was not requisite, yet, if given, it must be considered a proper notice, and to create a new contract. I cannot adopt that argument. The case of forfeiture is matter of strict right; and if I were bound to decide the case on that point, I should hold they were bound to redeem, according to that notice. They did not do so; but, on another day, when the prices were different. They were bound to proceed modo et formé. The notice does not state the amount of the debt, or the sums required for the redemption. I give no opinion

on this point.

I am of opinion that the sale must be set aside, and the parties restored to their former position, as if the cancelling had not taken place. The accounts must be taken.

As to costs, I am not entirely satisfied as to the mode in which the lapse of time is accounted for by the plaintiffs, but the objection is not so raised on this record as to enable me to refuse the relief sought by the bill. My present impression is, not to give costs on either side.

STUBBS U. LISTER. 1841.

Nov. 21th.

In February, 1825, a joint

stock compa-

ny was established for the

the capital of which was to

consist of 200 shares of £50

each. The di-

ther aid were required, then

they were to call a meeting

of proprietors and submit to

their decision

increasing the

number of shares, or of

taking such other steps as

plaintiffs, who

were shareholders, paid

of their calls.

rectors had power to exact Prendergast v. Turton.

 ${f B}$ Y an indenture dated the 8th February, 1825, and made between Richard Penrose of the first part; Sir Thomas Turton, Bart., Robert Clarke and Charles Carpenter of the second part; and the said Sir Thomas Turton, Robert purpose of working a mine, Clarke, and Charles Carpenter, and the several other persons whose names were thereunto subscribed and seals affixed of the third part, (being the deed of settlement of the "United Hills Mine Company):" it was covenanted and agreed, that the capital of the Company should consist of thefull payment of £50 on each the sum to be raised by the sale of 200 shares of £50 each, share, but if furand of such further sum or sums as might be raised by the sale of new shares, under the power for that purpose therein contained, such new shares not to exceed the whole number of shares, including the number of 300; that there should be the propriety of three directors of the Company, each of whom should hold twenty shares, and that Sir Thomas Turton, Robert Clarke. and Charles Carpenter should be the directors and trustees of the Company; that the directors should continue to hold might appear
advisable. The office from the day of the date of the said indenture for the space of seven years then next ensuing, and until the first Friday which should be in the month of June, 1832, and the full amount

but in October, 1826, were informed by the secretary of the Company, that he had some time since mentioned to a person (who was the plaintiffs' agent for payment of their calls), that in the previous July the directors had resolved to increase the amount of calls on each share. this the plaintiffs objected, and they refused to pay the additional calls. An altercation by letter ensued till about August, 1828, when the plaintiffs, as they alleged, left the country. In July, 1828, their shares were declared forfeited. The other shareholders then continued to work the mine, but the concern was unsuccessful till the year 1835, when it began to make an increasing profit. In November, 1837, the plaintiffs, as they alleged by their bill, returned to this country. In September, 1838, they filed their bill to be let into the receipt of the profits with the other September, 1838, they filed their bill to be let into the receipt of the profits with the other shareholders. It did not appear in evidence whether the plaintiffs were absent from this country, or where they were, between August, 1828, and November, 1837, except that it was admitted by the defendants that in 1828 they were in Jersey. Many acts of irregularity and misconduct in the management of the concern during the interval were admitted by the defendants, and amongst others the fact, that, during a great portion of that period, the concern was managed by an insufficient number of directors. The plaintiffs had no means, under the deed of settlement, of dissolving the society:—Held, that the plaintiffs, not having sufficiently accounted for their acts and conduct during the interval between August, 1828, and November. accounted for their acts and conduct during the interval between August, 1828, and November, 1837, must be considered as having acquiesced in the conduct of the directors and other shareholders in the concern, and were not entitled to the relief sought by their bill.

Tur. 205.

then should go out of office, but might nevertheless be reelected by the proprietors or directors for the then seven years next ensuing, or for any shorter term. directors should have power to renew leases, &c. That the directors for the time being should give one month's notice in each year of a general court of proprietors, to be holden at the office of the Company on the first Friday in June in each year, by letter sent to each proprietor. That at such general court a report should be made to the proprietors by the directors of the state of the mine, and an account given of the receipts and expenditure. That as to all questions relating to any business or matter to be transacted at the general meeting, or any special general meeting, a majority of the votes of all qualified proprietors present not declining to vote should be sufficient to decide the same, except for altering or rescinding the laws or regulations of the Company or dissolving the same, as thereinafter mentioned. That every proprietor should, on paying into the banking-house of the Company his first instalment, subscribe his name and place of abode in a book of the Company, &c., and such signature should entitle the shareholder to be considered from thenceforth as one of the proprietors of, and adventurers in, the said Company, and to the receipt of all the benefit and advantage thereof, in proportion to the shares holden by him or her, so long as he or she should comply with the conditions thereto annexed, and should pay the several instalments on the said shares of £50 each, as the same should be called for by the said directors for the time being. That the directors of the said Company should have power to call for instalments on the said shares at such times and in such proportions as should be necessary, and, if necessary, should have power to call for the whole instalments; and in case the same should, in the judgment of the directors for the time being, be insufficient for carrying on the business of the said mine without further aid,

PRENDERGAST v.
TURTON.

PRENDERGAST

7.
TURTON.

then and in such case the directors should call a meeting of the proprietors, and lay before them a full and particular account of the state of the concerns of the said Company, and submit to their decision the propriety of increasing the number of shares, or of taking such other steps as might appear advisable. That in case any instalment or instalments so called for by the directors as aforesaid should be unpaid for the space of fourteen days after the day fixed for the payment thereof, the share or shares on which such payment was called for and unpaid, and all the instalments which should have been previously paid thereupon, should be absolutely forfeited for the benefit of the Company; and the original holder thereof should cease from such period to have any interest, or advantage, or concern whatsoever in the said Company or mine, in respect of the share or shares so forfeited. That if at any time or times thereafter it should become necessary to increase the said shares of the said mine or Company by the addition of the number of 100 more shares of £50 each, as before provided, the increased number of such shares should be allotted and divided to and in equal proportions amongst the then proprietors according and in proportion to their respective shares; and in case any such proprietors should decline to increase his or their shares by such proportionate addition thereto, the shares declined to be taken by such proprietor or proprietors should be divided equally amongst such remaining proprietors, &c. the proprietors, who were in future to be eligible to fill the offices of directors, should be elected as follows, (that is to say), --- every vacancy occasioned in the office of director by removal, death, or resignation, or by any other means except that of going out at the expiration of the period for which they were elected, should be filled up with all convenient speed by the election of a new director at the annual general meeting, or at any special general meeting to be specifically called for that purpose.

the control and management of the funds of the Company should be vested in the directors for the time being, and they were thereby authorized and empowered at the general annual meeting of the proprietors to declare such dividend as in their judgment should be proper to be made amongst the proprietors, according to their respective shares.

The deed contained no provision relating to the dissolution of the partnership, notwithstanding the allusion to such provision before mentioned.

The deed was executed by the directors and the other proprietors or shareholders in the undertaking, and, amongst others, by a Mr. Serjeant, who was then the secretary, and who held twenty-five shares. Of these shares he sold four to Miss Mary Kent, and two to her sister, Miss Isabella Kent; and though the shares remained for some time in the name of Serjeant, the Miss Kents were treated by the Company as the real owners of those shares. Upon the occasion of Serjeant ceasing to be secretary, their names were entered in the books of the Company.

The Miss Kents regularly paid the amount of calls which were made upon them in respect of their shares, to the full extent of £50 per share. Before paying the last instalment, Mary Kent wrote a letter, dated in September, 1826, to Mr. Hebden, the then secretary of the Company, in which, after proposing to pay the tenth instalment, due on the shares of herself and sister, she requested to know whether that was likely to be the last call; adding that she was anxious to settle for all that was due without loss of time, as she was on the eve of leaving home. answer Mr. Hebden replied in a letter dated the 27th of September, in which he stated that he had some time previously mentioned to Mr. Wilson, (a gentleman who had been in the habit of paying the calls for the Miss Kents), that at a meeting of the shareholders it had been resolved to meet the expenses of the mine by additional

1841.
PRENDERGAST

TURTON.

PRENDERGAST

TURTON.

calls rather than by an increase in the number of shares, and that a call of £5 a share had been made, which had been paid on the 10th inst. In reply to this letter Mary Kent wrote a letter to Hebden, in which she said that she should make some arrangement for the payment of the additional £5 a share; adding, however, that she was not prepared for this last demand, as she had been led to suppose by the former secretary that no more than half the original sum of £50 would be required.

The resolution to which Mr. Hebden alluded to in his letter to Miss Kent, was passed at a meeting which took place on the 27th July, 1826, and was in these terms:—

"Resolved, that the mines be prosecuted with as much attention to the diminution of expense as possible; and that calls on each shareholder be in proportion to the number of shares held by each, and at intervals as great as the nature of the work contemplated will admit."

In November, 1826, Mary Kent married captain Stephen Prendergast. Soon after the marriage, Mrs. Prendergast received a letter from Mr. Hebden, in which, on the part of the Company, he demanded payment of the additional instalment of £5 per share, mentioned in his former letter, and also a further additional instalment to the same amount. These additional payments Captain Prendergast and Miss Kent refused to make; and they questioned the right of the Company to enforce them.

A long correspondence then ensued between Captain Prendergast and Mr. Hebden, in the course of which the former repeatedly offered to sell his shares to the Company at a reduced rate; and by a letter of the 22nd February, 1827, he made a specific offer of the shares to the Company at £25 per cent. These offers were refused on the ground that the additional calls had not been paid up. An objection was also raised, that the shares in question were not legal interests, but held in trust only. Captain

Prendergast and Miss Kent then attempted to sell their shares to third persons; and with this view, tendered to the Company, for their approval, a draft assignment of the legal interest. The Company, however, declined to do more upon this subject, than to consent to a case being laid before counsel.

PRENDERGAST

During these proceedings, fresh calls were continually made for instalments; and on the 6th of June, 1828, a meeting of proprietors was held, at which Captain Prendergast and Miss Kent were reported by the secretary to be considerably in arrear in the payment of their instalments, and it was ordered, that they should be written to, and apprized, that unless the arrears of their shares were paid up within a fortnight, the shares would be forfeited. On the 31st July, 1828, no letter having been received in answer to the notices sent in pursuance of the foregoing resolution, the shares of Captain Prendergast and Miss Kent were declared forfeited.

The bill was filed on the 5th September, 1838, by Captain and Mrs. Prendergast, against the then directors, Sir T. Turton, Duncan Campbell and Clarke, and against Serjeant and Miss Kent, the latter of whom had assigned her interest to the plaintiff. It alleged, that, in 1828, the working of the mine was entirely suspended; that, for some years afterwards, little or no profit was derived from it; that, during the whole of that time, the plaintiffs were absent from this country, and in consequence of the state of the concern took no further proceedings in respect of their shares, but that the plaintiffs returned to England at the latter end of 1837, when they applied to have their shares restored to them. The bill prayed, that the declaration of forfeiture of the plaintiffs' shares might be declared void, and that the plaintiffs might be let in to participate in the profits of the mine, upon payment of their share of all expenses incurred in the working of it; and with reference to certain alterations which had taken place in

PRENDERGAST 5.
TURTON.

the constitution of the Company, and certain alleged misconduct on the part of the directors, it prayed that the resolutions, by which it had been attempted to subdivide the shares, might be declared void against the plaintiffs, and that the business of the Company might be decreed to be carried on pursuant to the provisions of the indenture of settlement, and that the directors might be decreed to account for all sums of money improperly appropriated by them out of the funds of the Company.

The defendants, Turton, Campbell, and Clarke, by their answer, denied that the working of the mine had, at any time since August, 1828, been entirely, or almost entirely, suspended; but on the contrary alleged, that it had been ever since in full work, though the working of it was attended with considerable loss, till about the year 1835, when it began to yield a profit; and they verily believed, that the circumstance of the mine now yielding a considerable profit had induced the plaintiffs to take the present proceedings. They admitted, in answer to a charge in the bill as to that particular, that, at a meeting of shareholders held on the 7th of March, which was attended by the defendants, and of which, of course, no notice was given to the plaintiffs, it was resolved that certain clauses in the deed of settlement should be annulled, and that the capital of the Company should thenceforth consist of 4000 scrip shares of £5 each, making a capital of £20,000, and that twenty new scrip shares should be allotted for each old share, and that the shares of the plaintiff and Miss Kent should be sold for the use of the Company.

With respect to the charges of misconduct in the directors, the following facts were admitted by the answer:—that Carpenter, one of the original directors, died in 1831; that the time for Turton and Clarke continuing in office would, according to the deed of settlement, expire in 1832; that Turton and Clarke, nevertheless, continued the only directors till October, 1834, when Clarke became a bankrupt;

and that Turton afterwards was sole director till 1885, when Campbell joined him in the direction. Turton, however, in justification of himself, stated that in June, 1832, there were no other shareholders qualified, who would accept the office, and that in June, 1835, he was re-elected. As to Campbell, it was admitted, that he, at the suggestion and with the assistance of Turton, qualified himself for the direction by purchasing, at the low price of £50, twenty shares of one Harding, who had been formerly a director of the Company, but who had, in 1830, absconded from this country, while indebted to the Company in £300; and that several sums were due on these shares for calls in 1829 and 1830, which had never been paid up. also admitted, that Turton had charged the Company with his salary of £100 a year from 1826 to 1836, during a great part of which period the mine had been unproductive.

It appeared from the admissions, that the meetings, in which the proceedings relative to the forfeiture of the plaintiffs' shares were discussed, had been in several respects informally held.

There was no satisfactory evidence as to the exact residence of the plaintiffs during the time of their alleged absence from England. It was admitted by the defendants, that in 1827 and 1828 they were in Jersey.

Three grounds of defence were set up by the answer:—first, want of parties; secondly, multifariousness; thirdly, the Statute of Limitations, and length of time independent of the statute.

Upon the first point, the defendants' counsel contended, that all the shareholders, they being all interested in the introduction of the plaintiffs into the concern, should be parties; but, at all events, that the persons present at the making of the resolutions sought to be annulled, should be parties. This point, however, there being no necessity for it, was not determined.

1841.
PRENDERGAST

v.
TURTON.

PRENDERGAST

v.

TURTON.

Upon the second point, the plaintiffs' counsel referred to Ward v. Cooke (a), and Wynne v. Callander (b). As to the third point—

Mr. Simpkinson and Mr. Thomas Turner, for the plaintiffs, said, that the Statute of Limitations had nothing to do with the subject; the important part of the defence was that which rested on length of time, independently of the statute. It is a startling proposition to say, that parties who have advanced considerable capital, no part of which has been repaid to them, are to have no relief in respect of their advances, merely because of the lapse of a few years. Suppose the concern had been unprosperous, and the directors had dissolved partnership, would not the plaintiffs. have been entitled to an account, and to credit for what they had advanced? Could it be said in answer to such a claim, that six or seven years had elapsed since the claim arose? The length of time might and ought to have considerable weight to induce the Court to do justice to the defendants; but it would not altogether bar the plaintiffs, they being recti in curid, and the statute not applying. In Lake v. Craddock (c), the partnership had been abandoned by the father of the defendant thirty years before the bill was filed, and it was contended that the four survivors were entitled to the whole concern; but the decision of the Master of the Rolls was, that, though the legal estate survived to the four, Craddock's representatives had an equity in one-fifth. The Vice-Chancellor referred to Norway v. Rowe (d), and Senhouse v. Christian (e)]. It is submitted that those cases depend on circumstances differing very

in the Registrar's book. The prayer of the bill will be found in R. L. 1793 B. fo. 712, and the hearing and dismissal of the suit is recorded in R. L. 1794 B. fo. 257.

<sup>(</sup>a) 5 Madd. 122.

<sup>(</sup>b) 1 Russ. 293.

<sup>(</sup>c) 3 P. W. 158.

<sup>(</sup>d) 19 Ves. 144.

<sup>(</sup>e) Id. 157. It does not appear that the facts of this case are stated

strongly from such as occur here, though, if this case be considered with reference to them, the principles laid down by Lord *Eldon* in *Norway* v. *Rowe*, are perfectly consistent with those on which this case must be decided.

PREN DERGAST

9.
TUBTON.

This is not a case in which the plaintiff has his election between law and equity, or in which, there being a remedy at law, a Court of equity gives extraordinary relief. cases of that sort, no doubt the utmost promptitude is required of a plaintiff. In this case the remedy is entirely in equity, and the relief to be administered depends on the consideration of fraud. The defendants here can have no advantage from the Statute of Limitations, or from that analogy to the statute on which this Court frequently acts; but it is suggested that their ground of defence is the acquiescence of the plaintiffs. But acquiescence as distinguished from the statutory bar of the Statute of Limitations, is founded intrinsically on the subject of fraud. The parties against whom the doctrine of acquiescence has been enforced, have either concealed their rights, or led the other party to believe their rights have been waived, and so have inveigled that other party into expense, leaving him to expect that he should have the sole benefit. That is a fraud upon parties who lend out their money upon that faith, and those who so act cannot afterwards come forward under colour of enforcing their rights: East India Company v. Vincent (a), Hanning v. Ferrers (b), Arnot v. Biscoe (c). But in the former of these cases, Lord Hardwicke took the distinction as to dealing with another person's property with or without his acquiescence. the party dealing with the property has notice of the other party's rights, and no reason to suppose that he may not pursue them, the doctrine of acquiescence falls to the ground, because there is no fraud. What would Lord

<sup>(</sup>a) 2 Atk. 83. (b) Gilb. Eq. Rep. 85. (c) 2 Vez. sen. 96.

PRENDERGAST 9. TURTON.

Hardwicke have said to a case in which the party was excluded from his own property? The plaintiffs could not enforce their right; it was not practicable. They have done enough to establish their legal rights, and are entitled to a decree with all their costs. The majority, without the plaintiffs' consent, thought proper to call on them for an additional sum; the plaintiffs did not agree. Were they not at liberty so to do? Having entered into a limited engagement, were they to be compelled to go into a larger one? They were not bound to submit to those further calls. Could they get back their capital? Admitting they had a legal right to determine the partnership, how was that to be enforced, while the majority chose to go on? They could only dissolve it by a bill, to which all the shareholders would be necessary parties. They were compelled, therefore, either to continue paying more than was required by the deed, or to forfeit their shares. Has this result any foundation in the deed, or in law, or in justice? The plaintiffs thought it unnecessary to repeat useless applications. There was a quiescence for nine years, but no acquiescence for a moment. The plaintiffs offered every reasonable concession: what more could be done? There was no voluntary abandonment—no abandonment of their interests at all: and that distinguishes this case from Senhouse v. Christian. In that case, which is reported in a short note, and Norway v. Rowe, the parties working the mine had reason to believe from the other parties, that they had abandoned their interest. Here, all the plaintiffs did was to refuse to go on in the way proposed by the majority, and which was contrary to the settlement; for it cannot be contended that such a vague expression as "taking such other steps as shall appear advisable," gave them power to remodel the company. Supposing, even, they could have proved a case of acquiescence against the plaintiffs, they have not made that case by their answer. They rely on the statute, and also on length of time-which only means the statute, and length of time by analogy to the statute. Then they allege that if the concern had not turned out profitable, the plaintiffs would not have applied to the Court. But to make a case of acquiescence they ought to have alleged that the plaintiffs had given them reason to suppose, that in no case should they apply to the Court.

1841.
PRENDERGAST

6.
TUBTON.

Mr. Swanston, and Mr. Lovat, for the defendants, were stopped by the Court.

THE VICE-CHANCELLOR.—As to the objection for want of parties, after carefully attending to the argument of Mr. Swanston, I considered that the best course was to reserve that question till the case had been fully heard on the part of the plaintiffs, or on the part of the plaintiffs and defendants. The case has now been fully heard on the part of the plaintiffs, and, as I think, a case has not been made upon which this Court, according to the principles on which it acts, would be justified in giving the plaintiffs relief, I think it would be useless now to enter into the question of parties. To decide in favour of plaintiffs who fail on the merits, would be unnecessary; to decide in favour of the defendants would be to drive the plaintiffs to amend their bill, in a case where there was no prospect of relief.

I beg it, therefore, to be understood, that I give no opinion whatever on the question of parties.

Another point there is, which it is not necessary to decide, and which I wish not in any manner to be considered as deciding—I mean the question whether the course, which the directors thought proper to take as to the forfeiture of the shares, was such as ought to have been pursued, and whether their proceedings could not have been set aside, if steps had been taken in time for that purpose. My judgment is entirely consistent with the supposition that all they did was unauthorized, and capable of

PRENDERGAST 1

being impeached successfully, if the plaintiffs had come in due time.

v. Turton.

The point which has struck me from the beginning (and upon which every thing that could be said has been said by counsel) is the time at which the suit has been instituted, having regard to the peculiar nature of the property, and the circumstances of the case. This is a mineral property,—a property, therefore, of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profit in one year, and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge, experience, and eminence. Now, in the present case, conceding, for the sake of argument, that the shareholders could not be compelled to contribute beyond £50 a share, and did no wrong in declining to make advances beyond that sum, yet the result of all the circumstances of this case appears to have been, that the mine could not be carried on without further outlay.

The plaintiffs objected to this further outlay; and then a considerable discussion ensued, which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case. The residence of the plaintiffs was occasionally in Jersey and occasionally in England; but they never appear to have been absent from the Queen's dominions. In this state of things, the concern not improving, and the plaintiff and Miss Kent refusing to contribute to its necessities beyond the amount already stated, some parties are found who are willing to stem the difficulties and incur the hazard; and from this period, through several

years down to 1835, they venture to carry on the concern. In 1836 affairs begin to look better, and the mine, whether PRENDERGAST legally or illegally, wisely or unwisely, is in that year new modelled, and the shareholders are turned into what are called scripholders. Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that, after a profit had been made by the unassisted efforts of those who still adhered to the speculation, the plaintiff and Miss Kent applied for and claimed their shares. Negotiations were then set on foot, demands and refusals took place in the ordinary way, and it was not till September, 1838, that the bill was filed; but, the demand may be taken as made in 1837.

I was anxious, being impressed very much with Mr. Simpkinson's opening of the case, as it related to the conduct of the directors, to have the time which so elapsed in some way accounted for,-to have the chasm between the years 1828 and 1837 in some manner filled up,—to have the conduct of the plaintiffs during that time in some measure explained,—to have the case placed in a position upon which the Court could fasten itself, in order to give the plaintiffs that property which they might have been entitled to, had they presented themselves here in due time. But I am unable to find the means of doing this. Here is a mineral property, the subject of great uncertainty and fluctuation. After its character has been established with much difficulty—after a period of nine years, during which they rendered no assistance to the concern, a claim is brought forward by those who are now willing to share in its prosperity. It appears to me, that although this is a case to be decided in equity only, and at the hearing, and not on any interlocutory motion, it is impossible to say, (consistently with my views of what are the principles of this Court), that the plaintiffs can be assisted.

1841. TUBTON. PRENDERGAST v.
TURTON.

The way in which they state their case, as to this part of it, is this: (His Honour then read a passage in the bill; see ante, p. 103). The claim, therefore, was not brought forward till November, 1837, and, if there is any allegation, there is no evidence, of there being any recent discovery of their rights.

It has been suggested, that this has not been put in issue. I think it has, however, in various parts of the answer, in pointed allusions to the value and fluctuation of the property, and the conduct imputed to the plaintiffs in lying by during the existence of the fluctuation and the struggle. I find it, therefore, impossible to give that relief to the plaintiffs which they seek.

His Honour then said, that, unless he heard any argument to the contrary, he should dismiss the bill without costs. No such argument being raised for the defendants, the bill was dismissed without costs accordingly.

Dec. 8th.

His Honour, in the course of the argument in *Tulloch* v. Hartley, adverting to the foregoing case, said, that though his opinion remained the same, he thought it not an unfit case to be submitted to the Lord Chancellor.

Dec. 3rd, 4th.

## TREWEEK v. TURNER.

In order to enable the plaintiff to file a note under the 21st of the Orders of Aug. 1841, there must be an affidavit of appearance entered.

MR. SANDYS, for the plaintiff, moved, under the 22nd of the orders of August 26, 1841, for leave to file a note, under the 21st of those Orders. He produced the certificate of the plaintiff's clerk in court as to the defendant having entered an appearance on the 17th of February last.

THE VICE-CHANCELLOR.—That is a certificate of the plaintiff's own agent in his own favour. There must be an affidavit.

The motion was afterwards granted, on the affidavit of the plaintiff's solicitor's clerk, which was to the effect that he had examined the book of the plaintiff's clerk in court, and that of the defendant's clerk in court, and that, on examining the latter, he was enabled to state, that the appearance was entered at the time mentioned.

1841. THENER.

#### WRIGHT P. LOCKWOOD.

Dec. 4th.

a competent witness for the

 ${f T}$ HIS was a creditor's suit for the administration of surety in a joint the real estate of William Lockwood, who died in June, and several promissory note is 1835.

The plaintiff, Charles Wright, was a creditor of the tes-note creditor in tator upon a joint and several promissory note dated the by him for ad-21st January, 1825, and signed by the testator, and his assets of the brother, Gerrard Lockwood, as surety. The bill was filed principal debtor. in Trinity Term, 1838, and in order to prove the existence of the debt at that time, the plaintiff's counsel, Mr. Cooper, proposed to read the evidence of Gerrard Lockwood, who stated that he did, by the direction of the testator, and out of money delivered by him to the deponent, pay to the plaintiff the interest which became due on the 21st January, 1834.

Mr. Ronsilly, for the infant devisee and heir of the testator, objected to this evidence, as being given by a surety, who was directly interested in discharging himself of the debt, and throwing it on the testator's estate.

THE VICE-CHANCELLOR.—Both he and the testator's estate are primarily liable. I shall receive the evidence on the authority of Wood v. Braddick (a), which, though I have some notion of having heard doubted, has not, I believe, been overruled.

(a) 1 Taunt. 104.

VOL. I.

N. C. C.

1841.

Dec. 4th.

TULLOCH v. HARTLEY.

The Courts of this country, in dealing with real property in Jamaica, will be guided by the law of evidence in Jamaica.

in Jamaica.

A Court of
Equity in England will entertain a bill to settle the boundaries of real estates in Jamaica.

3 Hare 222

THE bill was filed by legatees and annuitants under the will of Elizabeth Simpson, to obtain payment of their legacies and annuities out of her real property in Jamaica; and for that purpose, praying that her estates in that island might be ascertained; and that in particular, an estate called Boden's Land, now blended with a larger estate called the Bounty Hall estate, might be declared to be part of the property of the testatrix; and if necessary, that the boundaries of her estates in Jamaica might be settled by commissioners to be appointed by this Court.

In the course of the cause, Mr. Cooper, and Mr. James Parker, for the plaintiffs, tendered in evidence an examined copy of a deed relating to the Bounty Hall estate; such copy not being taken from the original, but from the copy of the original as registered in the island. They relied on the act of Assembly, 4 Geo. 4, c. 5, sect. 2. (a).

(a) By which, "in order to prevent the difficulty that attends the proving titles to estates where the original patents, wills, or deeds are or may be lost or mislaid, or the witnesses who attested the same are dead, or gone off this island, or not to be found," it is enacted, "that the record of any letters patent enrolled in the secretary's office or office of enrolment in this island, and the record of any deeds duly executed and proved, or acknowledged and enrolled in the said office or any other office of record, according to the several acts of the Governor, Council, and Assembly, in that case made and provided, and the record or enrolment of any last wills and testaments duly exe-

cuted according to law, and proved before the Governor or Commanderin-Chief by one or more of the subscribing witnesses thereto, shall at all times hereafter be deemed, judged, and taken to be sufficient evidence of the several persons' titles to any lands, tenements, negroes, hereditaments, or estates whatsoever, real or personal, claimed under the said patents, deeds, conveyances, or wills; and the same shall be read and allowed in all and every court or courts of law or equity within this island as if the original patents, deeds, conveyances, or wills were actually produced. proved, and read in all and every the said courts." See Howard's Laws of the Colonies, vol. 1, p. 48.

Mr. Simpkinson, and Mr. Rennalls, for the defendants, objected to the reception of this evidence.—This is a copy of the instrument as entered in the registry-books, or in other words, a copy of a copy (a), and therefore, on general principles, not receivable in evidence. The Vice-Chancellor.—If the copy in the registrar's office was brought over here, would you object to that?] We should, unless it were examined, and notice to produce given. The evidence must be according to the law of this country, and not that of Jamaica. How can an act of Assembly allowing copies of copies to be evidence be recognised here? It applies only to proceedings in Jamaica. The original must be proved as in any other case; or, at all events, the plaintiffs must prove that it is lost or mislaid, or that the attesting witness cannot be found.—Brown v. Thornton (b); Appleton v. Lord Braybrook (c); Airton v. Davis (d).

TULLOCH HABTLEY.

THE VICE-CHANCELLOR.—I must receive this copy in evidence. It relates to immoveable property in another country. The original is an instrument, the domicile of which, (so to speak), must have been in a foreign country, and there is no constat that it ever arrived here. By the law of that country, the deed is to be enrolled and recorded; and the enrolment and record are to have the same force as the original. The record and enrolment cannot be brought here: what is tendered is an examined copy. Without regarding the evidence which has been given of search for the original, I am of opinion, that this copy, being an examined copy, ought to be read.

In arguing the foregoing case on the merits, the defendants' counsel disputed the authority of the Court to make any decree to settle the boundaries of lands in Jamaica,

<sup>(</sup>a) Locke, Hum. Und. B. 4, ch. 16, sect. 10. (b) 6 Ad. & Ell. 185. (c) 2 Stark. 6. (d) 1 Mont. & A. 258.

TULLOCH v.

and in support of their argument cited *Penn* v. *Lord Baltimore* (a); *Pike* v. *Hoare* (b); and *Bayley* v *Edwards* (c). *The Vice-Chancellor*, however, gave judgment, without mentioning any doubt as to the jurisdiction.

(a) LVez. sen. 444.

(b) 2 Eden, 182.

(c) 3 Swanst. 703,

Dec. 10th.

## OSBORNE v. HARVEY.

Where a purchaser is let into possession of the estate under the contract, his dealing with the property in a manner contrary to former usage, or contrary to the usual course of husbandry, may be ground for ordering him to pay the purchase money into Court, or for the appointment of a receiver; but will not authorise a decree against him to compel him to accept the title on the ground of waiver of objections. A receiver may be appointed at the hearing. though not prayed for.

SPECIFIC PERFORMANCE. Upon a bill filed by vendor against purchaser, the principal question was, whether the defendant by his acts of ownership had waived objections to title. The defendant having, by virtue of the conditions of sale, been let into possession of the premises, which consisted of about four acres of land, had stubbed up an osier-bed, or holt, consisting of about 9 perches, and levelled the land, and had also filled up a pond.

Mr. James Russell, and Mr. Greene, for the plaintiff.—
The mere taking possession of the property is not a waiver of objections to title; but if a party enters, he must deal with the property without injury, and in the usual course of husbandry: Margravine of Anspach v. Noel (d); otherwise it is an acceptance of title. Letting premises amounts to an acceptance of title: Ex parte Sidebotham (e). [The Vice-Chancellor, (after referring to Cutler v. Simons (f), and Bonner v. Johnstone (g)).—The mere fact of an unauthorized conversion of the property by the defendant, though it may justify an order for bringing the money into Court and the appointment of a receiver, may not authorize a decree against him. A receiver may be appointed at the hearing, though not prayed for.]

THE VICE-CHANCELLOR.—At present I am not disposed to force the title on the defendant. What good he will

<sup>(</sup>d) 1 Madd. 310.

<sup>(</sup>f) 2 Mer. 103.

<sup>(</sup>e) 3 D. & C. 818.

<sup>(</sup>g) 1 Mer. 366.

gain by a reference is another thing—payment into Court of the uttermost farthing, and a receiver. Unless. however, Mr. Russell can produce some further authorities as to acts of ownership being a waiver of objections to title, a reference as to title must be directed.

1841. OSBORNE Ð. HARVEY.

Mr. Russell admitted that he could carry the case no farther.

#### SILLICK v. BOOTH.

Dec. 12th.

RICHARD CORBITT died on the 24th January, 1829, Presumption having by his will directed the residue of his property to died at a parbe converted and divided amongst his three children and ticular time grandchild, as hereafter mentioned. Of these children, James and Charles were merchant seamen; the former heard of; the being the master, and the latter the second mate of a ship called the "Thames," which traded between England and ricane months, the West-Indies. They left Demerara for England on the having sailed from Demerara 19th December, 1828, and touched at Dominica on the before the ex-24th of that month, after which they were never seen or heard of. Upon these facts, and upon hearing the evi- months. dence of witnesses as to other circumstances which will be stated, the Master to whom this cause stood referred came to the conclusion that the two sons survived the father.

The evidence before the Master consisted principally of that of Mr. Robertson, the commander of a merchant vessel, and Mr. Danson, a harbour-master, who had been many years a sailor, and had made twenty-two voyages between this country and the West-Indies. The former of these deponents stated, that he left Demerara with his vessel on the 13th January, 1829, and that he and other captains were becalmed during the first six weeks, after which they met with very tempestuous weather. That in the course of the voyage he spoke with a vessel which had left Demerara the day after the "Thames." That his voyage

within the seven years after he had been last particular time being the hurand the party piration of the hurricane

SILLICE 5. BOOTH. was about ninety-two days, and that other masters of ships as well as himself complained of the unusual length of the voyage in that year. Taking all things into consideration, he was of opinion, that the loss of the vessel could not be presumed within four months after the commencement of the voyage. On the other hand, Danson stated, that ships sailing at the same time from the West Indies, although they might be in the neighbourhood of each other, might meet with very different weather, some coming under the influence of hurricanes, and others not; but that the average length of a voyage to England was from 50 to 56 days. That hurricanes usually prevail between the 19th and 40th degrees of north latitude. That the period between the 1st August and the 10th January is known by the name of the hurricane months; and that, during that period, the premiums for insurance of ships are double the amount of those at any other period of the year. This deponent also stated, that, in his opinion, no captain of a ship could judge of the length of the voyage of one vessel from that of another sailing from the same part of the West Indies at the same time. In addition to this evidence, it appeared from a letter of James Corbitt to his wife, that he expected to be in England on the 27th February.

Exceptions having been taken to the Master's report,

Mr. Swanston, Mr. Purvis, and Mr. Bellamy, for the exceptions.—It is clear from the evidence, that the period of the hurricanes had passed before the testator's death; and therefore, upon the supposition that the vessel was wrecked in the hurricanes, which is the most probable supposition, James and Charles Corbitt must have died before their father. The seven years having now elapsed, during which the law presumes that the party may be alive, it is competent for the Court to presume that the death took place at any period within the seven years, to which particular circumstances may point.

Mr. Cooper, and Mr. Hare, for the report.—No doubt, where probable evidence is adduced to shew that a party died at a particular time within the seven years, the Court may presume that the party died at that time: Webster v. Birchmore (a); Rex v. The Inhabitants of Harborne (b). But the presumption of law is in favour of life till after the seven years; and, therefore, they who found a right upon the party having died at a particular time within that period, must, to use the language of Follett, arguendo, in Doe v. Nepean (c), "establish that affirmatively by evidence." [The Vice-Chancellor.—Suppose they cannot do Suppose a man was seen at St. Peter's at Rome, upwards of seven years ago, in perfect health, and has never been since seen or heard of, when is it to be presumed that he died?] At the end of seven years; by analogy to the statute of bigamy (d). The burden of proof is on those who assert his death: Wilson v. Hodges (e); Watson v. King (f). There is no evidence here to shew that the vessel was wrecked at a particular time. There can be no more presumption in this case that she was wrecked before the 24th January, 1829, than if she had sailed from Demerara for a voyage round the world; in which case the Court would have entertained no such presumption.

Mr. Swanston in reply.

THE VICE-CHANCELLOR.—The small amount of the property, the time and money which have been already consumed in the investigation of this matter, as well as the possibility that the expression of a judicial opinion on the question of fact may the more readily enable any party dissatisfied with my judgment, to obtain that of the Lord Chancellor—all these considerations induce me to give

BOOTH.

<sup>(</sup>a) 13 Ves. 362.

<sup>(</sup>b) 2 Adol. & Ell. 540.

<sup>(</sup>c) 5 B. & Adol. 90.

<sup>(</sup>d) See 6 East, 85.

<sup>(</sup>e) 2 East, 312.

<sup>(</sup>f) 1 Stark. 121.

SILLICK
v.
BOOTH.

and to act upon the opinion, which the evidence before me impresses upon my mind.

The question is, whether these two seafaring men, James and Charles Corbitt, did or did not survive their father, whose death is known to have taken place on the 24th January, 1829. They were in a vessel apparently sound, a brig of 235 or 236 tons, which was at Demerara in 1828. The brig, with the two men on board, appears, by the evidence, to have sailed on the home voyage upon the 18th or 19th December, 1828. Probably there is no strict legal evidence of the vessel having been seen, or having touched any where since; but, if there is such evidence, it is confined to her having touched at Dominica. My opinion however is the same, whether she is to be taken or not to have touched there. Subject to the question, whether she there touched on that day, she left Demerara on the 19th December.

There is no doubt the two men died. The question is, whether they died in their father's lifetime. That will turn, (if there is no rigid rule of presumption), on probability; or on that state of things, which, in deciding as well as we can upon the evidence, is to be presumed. Now, considering the local nature and limited duration of the hurricanes in those seas, it is consistent with Robertson's evidence, that the ship may have met with stormy weather, and have been wrecked at sea before the 10th January. Then, the evidence of Danson is specific as to this-that a period between a day in August, which he mentions, and the 10th of January, which he also specifically mentions, is called the hurricane months. and that the premiums of insurance are higher during that specific period; and, in consequence of the stormy weather there during that period, he states it to be his opinion, that the ship was lost in the early part of January. That also is mine. If I am to consider what is the most probable case—whether it was lost before the

1841.

SILLICK

Воотн.

24th day of January, or upon or after that day, I have no hesitation in coming to the conclusion, that both she and the crew were lost before that day of January. It is not for me now to decide what rule of presumption ought to guide the Court, in a case where there is no probability one way or the other—where, for instance, there is no question of health or danger; but where, on a particular day, a healthy man is seen exposed to no danger, and is never seen or heard of again—that is not a case which it is now necessary to decide. It is not the present case, nor is it, I apprehend, the case of Rex v. Harborne. Therefore, without saying more on that subject, I am of opinion, for the reasons which I have stated, that these men died in their father's lifetime.

I may add, however, that this is a fit case for further investigation, if the parties wish it; and perhaps the Lord Chancellor would be ready to decide it, without sending it to a jury.

1842. Feb. 11th,

On this day the cause came on for hearing on further directions, when several questions were raised on the construction of the will of the testator, Richard Corbitt.

The testator, by his will dated the 28th October, 1828, personal estate to trustees, upon trust to convert several specific legacies to his daughter Mary, and to his money, and

Testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay

his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of his said estate and effects equally between and among his children, J., M., and C., and his grandson, R., share and share alike; the share of M. to be paid her as soon after his decease as conveniently might be, the share of C. to be paid him at the age of 22, and the share of R. at the age of 21; and in case any of his children or grandchild should die before his or her said share should become so vested as aforesaid, then the share or shares of him, her, or them so dying, should go and be equally divided among the survivors and survivor of them in equal shares and proportions, if more than one, and if but one, then the whole to and for the use and benefit of such survivor. J. and C. died in the testator's lifetime, the latter being under 22. R. survived the testator, but died under 21:—Held, 1st, that the word "vested" must be construed to mean "payable," and that the original shares of the deceased children and grandchild survived to the survivors; and 2ndly, that the word "whole" meant the whole residue, and, consequently, that the accruing as well as the original shares devolved to M., as the sole survivor of the four residuary legatees.

Where two persons die by the same stroke or accident, and there are no special circumstances in evidence from which it can be presumed that one died before the other, the law of England will draw that presumption from general circumstances; such as the comparative health,

strength, age, or experience of the parties.

SILLICK v. BOOTH.

son Charles, gave, devised, and bequeathed to the plaintiffs, their heirs, executors, and administrators, all his real and personal estate, upon trust, as soon as conveniently might be after his decease, to sell, dispose, and convert into money, such part of his said estate and effects as did not consist of money, and thereout to pay his debts and funeral expenses; 'and then to pay to his son, James, the sum of £400, on his giving such security as might be approved of by his executors, and on his paying £5 per cent. interest for the same; which interest was to be paid by his executors to his the testator's wife, Jane, for her life, by weekly instalments, and to be in lieu of dower: and upon trust, to divide the residue of his said estate and effects, (the said sum of £400 being considered as a part), equally between and among his children, James, Mary, and Charles, and his grandson, Richard Corbitt, share and share alike; the share of his said daughter, Mary, to be paid to her as soon after his decease as conveniently might be; the share of his said son, Charles, to be paid to him on his attaining the age of twenty-two years; and the share of his said grandchild to be paid to him on his attaining the age of twenty-one years: and as to the shares of such of them as should not have attained the said ages of twentytwo and twenty-one years respectively at the time of his the testator's decease, he ordered and directed that the plaintiffs, their heirs, executors, and administrators, should stand possessed of and invest the same at interest, upon Government or real securities, and should pay and apply the interest, dividends, and proceeds thereof, and arising therefrom, for and towards their maintenance, education, and bringing up; and in case any of his said children, or grandchild, should happen to die before his or her said share should become so vested as aforesaid, then, and in that case, the share or shares of him, her, or them so dying, should go to and be divided among the survivors and survivor of them in equal shares and proportions, if more than one,

and if but one, then the whole to and for the use and benefit of such survivor.

SILLICE V. BOOTH.

By a codicil the testator revoked that part of his will, by which he directed the executor to pay the interest of the £400 to his wife, and instead thereof directed his son, James, to make that payment.

The testator died leaving his daughter Mary, who afterwards married Mr. Booth, and his grandson Richard surviving him, but having survived his sons, James and Charles; the former of whom died at the age of twenty-eight, having, according to the Master's report already referred to, survived his brother Charles, who died a minor.

Richard Corbitt, the grandson, having survived the testator, died under the age of twenty-one, leaving Thomas Cleghorn Corbitt, the infant son of James Corbitt, his heirat-law, and also heir-at-law of the testator.

Mr. Purvis, and Mr. Bellamy, for the plaintiffs.

Mr. Cooper, and Mr. Hare, for T. C. Corbitt.

Mr. Simpkinson, and Mr. Wright, for Mr. and Mrs. Booth.

Mr. Swanston for the administratrix of Richard Corbitt, the grandson.

The first question was, whether T. C. Corbitt took any part of the share of his father James, either as heir-at-law of the testator, (the share being considered as in part unconverted), or as next of kin of his father.

On this point it was contended by the counsel of T. C. Corbitt, that James's share was not included in the clause of survivorship; that clause only applying to those shares which were payable at 21 or 22. [The Vice-Chancellor.—Mary is alluded to in that clause by the word "her;" and

SILLICK v. BOOTH. yet her share was to be paid as soon as conveniently might be after the testator's death.] The direction in the codicil as to the payment by James of the interest of the £400 to his mother shews, that the testator did not contemplate that James would die before him.

THE VICE-CHANCELLOR said, that if he could properly entertain a wish on the subject, he should be glad to decide the question in favour of the eldest son's son; but, in his opinion, the clause of survivorship applied to all the three children and grandchild, and, consequently, that the share of James did not lapse, but survived (a).

It was then contended on behalf of the administratrix of Richard, that the residuary shares, if considered as personalty, vested at the death of the testator, which was also the period of survivorship; consequently, that one moiety of the shares of James and Charles, who died in the testator's lifetime, survived to Richard.

THE VICE-CHANCELLOR. — I have already stated my opinion, that the clause of survivorship is an entire clause, and must be considered as applying to the four residuary legatees. Therefore, looking also at the entire clause, I am of opinion that the words, "so vested as aforesaid," were meant in the same sense as if the testator had said, "so payable as aforesaid."

I think the circumstance of James and Charles having died in the testator's lifetime, and of Richard, though he survived the testator, having died before his share became payable, operated to give the whole to Mary as the survivor, subject to what I am now about to say.

The Master, I think, was right in finding that Charles died first. His brother was a stronger and more experienced seafaring man. The effect of Charles's dying was to give his original share to the survivors. Then comes

<sup>(</sup>a) See Humphreys v. Howes, 1 Russ. & M. 639.

the death of James. The clause of survivorship does not extend to accruing shares. Therefore there was an intestacy as to James's share of Charles's share; but James's original share would go over to Mary and Richard. Then dies Richard. The clause does not extend to Richard's portion of the shares of Charles and James. Therefore, Richard's portion of the shares of Charles and James would go to Richard's representatives; subject to which, Mary would take the whole. But there is a question as to Mary's interest which I should be glad to have argued.

BOOTH.

It was then suggested by Mr. Simpkinson, for Mary Booth and her husband, that the Master was wrong in finding that James Corbitt survived his brother; the grounds of his finding being merely these—that James was a robust man, and older and stronger than his brother, and both had been exposed to the same struggle. If this was a wrong finding, no portion of Charles's share would survive to James, but the whole would go to Richard and Mary. And he contended that the Master was wrong; for that where two persons are killed by the same stroke or accident, the law of England, whatever the civil law may do, does not presume that one survived the other. And he said, that no decision had ever been given in General Stanwix's case(a). In support of his argument he cited Rex v. Dr. Hay (b); Swinburn, Part 7, sec. 33; Wright v. Netherwood (c); Hitchcock v. Beardsley (d); Bradshaw v. Toul-, min(e); Mason  $\forall$ . Mason (f); Taylor  $\forall$ . Diplock (g); In the goods of Selwyn (h).

In the course of the argument, the Vice-Chancellor having asked whether this part of the Master's report had been excepted to was informed that it had not.

- (a) Fearne, Posth. Works, 38.
- (b) 1 W. Bl. 640.
- (c) 2 Salk, 593, n.
- (d) West, Rep. t. Hardw. 445.
- (e) 2 Dick. 633.
- (f) 1 Mer. 308.
- (g) 2 Phill. 261.
- (h) 3 Hagg. Ecc. Rep. 748.

SILLICK V. BOOTH. THE VICE-CHANCELLOR.—The question is, whether any presumption arises as between Charles and James with respect to the survivorship of either of them. I am of opinion that the two brothers having perished by shipwreck under circumstances of which there is no evidence, it is not necessary to be taken that they died at the same instant. By the law of England, evidence of health, strength, age, or other circumstances, may be given in cases of this nature, tending to the judicial presumption that one party survived the other. Therefore, if the matter were open, I should hold with the Master, that, having regard to the age and condition in life of the two brothers, it is to be presumed and decided that James survived Charles(a).

His Honour then said, that he wished to have the question argued, whether the word "whole," in the clause of survivorship, did not give Mary the shares which had accrued

(a) Upon this subject see Dig. lib. 34, tit. 5, ch. 10, arts. 22, 23, de rebus dubiis; Touillier, Droit Civil Français, tom. 4, No. 76; Causes Célèbres, tom. 3, p. 412 et seq. The 720th Article of the Code Civil is as follows :-- "Si plusieurs personnes respectivement appelées à la succession l'une de l'autre périssent dans un même évènement sans qu'on puisse reconnaître laquelle est décédée la première, la présomption de survie est déterminée par les circonstances du fait, et, à leur défaut, par la force de l'âge ou du sexe." Upon this a learned commentator M. Rogron, remarks as follows :---

Périssent dans un même évènement.—Il devient alors indispensable de fixer laquelle de ces personnes a survécu aux autres, et par consequent leur a succédé. Si on ne peut pas le faire par des preuves certaines, on sera forcé de s'arréter à des présomptions plus ou moins fortes, car il faut bien nécessairement que ces successions soient données à l'une de ces personnes.

Par les circonstances du fait.—
Par exemple, dans l'incendie d'une
maison qui a commencé par le
premier étage, ceux qui l'habitaient
ont péri probablement avant ceux
qui habitaient les étages supérieurs;
dans un naufrage, ceux qui savaient
nager ont survécu probablement à
ceux qui ne le savaient pas.

A leur défaut.—Ce n'est que dans les cas où les circonstances manquent entièrement, que l'on a recours aux présomptions fondées sur l'âge et sur la force, parcequ'elles ont toujours quelque chose de très incertain. to the deceased legatees by survivorship, as well as the original shares.

SILLICK V. BOOTH.

In consequence of this suggestion, Mr. Cooper, on a subsequent day, argued against the proposition that Mary took the accruing shares.—It is clearly settled, though the doctrine has frequently been objected to, that there shall not be a double survivorship, unless an intention to that effect appears clearly on the face of the will. And no such intention is shewn, unless you shew that the testator meant to preserve the fund entire. The cases establish that the words "share or shares" would not be sufficient to carry over the accruing shares. In Woodward v. Glasbrook (a), Lord Holt first laid down the general doctrine: and that case was followed by Sir Joseph Jekyl in Rudge v. Barker (b). The Vice-Chancellor. — There the words were "£1000 apiece." The word "apiece" is omitted in the edition of 1799 (c). The other authorities which support the general doctrine are Pain v. Benson (d), Ex parte West (e), Worlidge v. Churchill (f), Crowder v. Stone (a), and Bright v. Rowe (h). The cases in which the Courts have departed from the general rule are Barker v. Lea (i), and Eyre v. Marsden (j). But in those cases there were much stronger words to carry over the whole interest than any that can be found here. It is obvious that in this case the testator, in speaking of shares, as he does in several parts of his will, as, for instance, the share of Mary, the share of Charles, &c., meant original shares only; and, therefore, the "whole" must mean-not the mass of the property, but the whole of the original shares only.

- (a) 2 Vern. 388.
- (b) Ca. temp. Talb. 124.
- (c) On consulting the Registrar's book it was found that the original edition which contains the word "apiece" was correct. See R. L. 1734, B. fo. 537.
- (d) 3 Atk. 78.
- (e) 1 Bro. C. C. 574.
- (f) 3 Bro. C. C. 65.
- (g) 3 Russ. 217.
- (h) 3 My. & K. 316.
- (i) Turn. & R. 413.
- (j) 4 M. & C. 231.

1842.

SILLICE v. BOOTH. Mr. Simpkinson, contrà, was stopped by the Court.

THE VICE-CHANCELLOR.—I think that, according to the true sense and meaning of the testator's expression "survivors and survivor," there was but one survivor, and that the event has occurred in which the testator has said, that the survivor shall take the whole. The word "whole" means the entire residue. The result is, that Mary, being the only survivor, must take the whole.

1841.

Dec. 10th, 11th.

Where a partner is required, at the suit of a person entitled to ask it, to give discovery as to matters contained in the usual course of business in the partnershipbooks, it is no excuse for his not giving that discovery to allege generally that his copartners refuse to allow him access to the partnership-books.

Hare. 102. Oh. 222. Pear. 256

# TAYLOR v. RUNDELL.

IN 1835 a bill was filed by the executors of the late Duke of York as lessors, against the defendants as the three surviving lessees of certain mines at Cape Breton, in Nova Scotia, under a lease granted to them by the Duke as grantee of the Crown.

The bill, which proceeded on very strict covenants contained in the lease, prayed discovery of the mines opened, and an account of the produce.

In May, 1837, The Vice-Chancellor of England decreed, that the accounts prayed for by the bill should be taken; but, inasmuch as that suit did not extend to any mines of the Duke, other than those in Cape Breton, another bill was filed between the same parties in September, 1838, praying the same relief and discovery in regard to the other mines of the Duke in Nova Scotia.

It appeared, though it was not so stated in the lease, that the defendants were trustees for a joint-stock company called "The General Mining Association," of which they were also shareholders, and, jointly with other persons, directors; and the interrogatories before the Master in the former suit, and the charges in the bill in the latter, were in a great measure directed to the discovery of docu-

ments in the possession of the association, and other matters necessary for taking the accounts.

After three examinations in the former suit had been reported insufficient, and after the answer of the defendants in the latter suit had been ruled by the Lord Chancellor to be insufficient in respect of the discovery thereby sought, the defendants put in a fourth and a fifth examination, by which, in substance, they stated as follows:-That since their former examination, they had sent to the secretary of the association the following letter-[Then followed a letter, in which they informed the secretary of the nature of the second suit, setting forth the various charges in the bill relative to the documents, and adding, that though it was impossible for them to answer the inquiries from their personal knowledge, yet as the Lord Chancellor had determined they were bound to obtain such information as they were able, they requested the secretary to lay that letter before the board of directors at their first meeting, and also to apply for an order from the board for unlimited access to all the books and documents of the association, with full power to make extracts, &c.] That, in reply to such letter, the secretary wrote to the examinants the following letter-[Then followed a letter from the secretary, in which he stated, that the board of directors refused access to the documents, and had passed a resolution to prevent any of their officers from supplying such information as was sought by the bill.] That the examinants had made a similar application to the agent in America, and had met with a similar refusal. That the examinants had not interfered directly or indirectly with the secretaries or board of directors, to procure such answers or such resolu-"And these examinants say, that, even if free and uninterrupted access had been given to them to all the books, papers, and documents of the said association, it would require several months to make out such accounts as are required by these interrogatories; but, under the

TAYLOR v.
RUNDELL.

TAYLOR

U.

RUNDELL.

circumstances aforesaid, these examinants are unable to obtain access to the said books, papers, and documents."

The Master having reported this examination sufficient, exceptions were taken to his report.

Mr. James Russell and Mr. Gifford, for the exceptions, relied on the judgment of Lord Cottenham in Taylor v. Rundell (a).

Mr. Wood, contrà, contended, that that judgment turned on the want of any application by the defendants for access to the documents, and of any refusal by the Company. Here, it clearly appeared, that all that the defendants could do, had been done. That no case had gone the length of deciding, that a party, who was not in possession of documents, except by being able to file a bill for them, was to be put to a suit to get them, in order to give an answer in another suit of a totally different description.

THE VICE-CHANCELLOR.—In this case, interrogatories were exhibited in 1837, or 1838, for the examination of the defendants upon the material questions in the cause, which interrogatories never were complained of.

Five several examinations at various intervals have been put in. It has been decided and admitted, that the four first do not form a complete answer to the interrogatories which they profess to answer; and the question is, whether the fifth coupled with the other four does or does not form a sufficient answer.

The defendants are the lessees, or two of the lessees, of the mineral property in question. The lease, as was known to the lessor, was taken with a view to the foundation of a joint-stock company, for the purpose of working the mines. The covenants were of the usual description in such cases; or, perhaps, of more than usual strictness, binding the lessees to keep accounts, and make returns of

the produce of the mines; and providing in substance, that all material information on that subject should from time to time be communicated to the lessor. TAYLOR

U.

RUNDELL.

It is admitted, that certain questions in the interrogatories, relating to the produce and working of the mines, have not been answered. It is admitted, that those questions are material. It is admitted, that the plaintiffs ask for information within the scope of the covenants in the lease to which I have referred. It is admitted, that the lessees are bound by those covenants, and that, although the information sought has not been given, the means of giving it, or at least of giving more than has been given, exist in certain books and accounts, the inspection of which would enable the defendants to answer the interrogatories, if not completely, at least more fully than they have done. The contention is, that these books and documents are not open to, or within the power of the defendants, according to the meaning of the term as used with reference to subjects of this nature; and that, therefore, a statement of matters contained in these books and documents, however relevant and material, is information which the defendants are not bound to give.

These books and documents belong to and are in the possession of the joint-stock company, or partnership, which was formed for working the mines; the members being the persons on whose account the lease was taken and is held—the persons claiming and entitled to the benefit of it—the persons who are in possession under it, and who must be considered as bound by the covenants which it contains. The Company's affairs are managed by directors. Of these, the lessees (defendants) now before the Court are two, and being proprietors of shares, they are members of the partnership. The books being thus in the possession of the partnership must, prima facie, be held to be at least accessible to the defendants. They are in the personal keeping and custody of the secretary or

TAYLOR v. RUNDELL.

clerk of the partnership, who is the servant of the directors, as managing for the partners; and it is stated, and no doubt truly, that the board of directors, or such of them as have assembled, have passed a resolution, that the secretary shall not allow to two of their body-two of his employers and masters, namely, the defendants—the means of information upon this particular subject, by access It is not suggested by the defendants, that to the books. there is any legal, or equitable, or moral justification for the course which is said to have been thus pursued; it is not attempted to be maintained, that, justly, honestly, or fairly, this ought to have been, or to be done. And the question is, whether, under all the circumstances, I can allow the defendants effectually to say, that the books are inaccessible to them; or that, if accessible, they are not bound to look into them. Can it be, that, when property is held by a partnership, subject to the obligation and duty of communicating certain information respecting it to some other person interested, (that information being properly, and in the usual course, contained in books kept by the partnership), and that other person seeks the information by a bill against those members of the partnership, who are trustees of the property for the partnership, and are among the managers of it—the defendants, not in answer to any motion for production, but as a reason after decree for withholding the information only to be obtained from those books, can be heard to say, that their partners or fellow-directors passed a resolution for refusing them access to the books, to the possession, use, and inspection of which they are equally entitled—the joint possession of the books all the while continuing? The proposition is one, which, if granted, would open a door to great abuse and oppression. It would stand in the way of the administration of justice, and, in my opinion, unfairly prevent the arrival at truth. If any substantial difficulty were shewn, that might be a reason why time should be given to the defendants. Such, however, is not the contention here. Conceiving it to be the duty of the defendants to inspect the books if they can, and that they have not sufficiently, or in a manner to which a court of justice ought to attend, shewn that they cannot, I hold the examination insufficient.

TAYLOR V. RUNDELL.

I have the satisfaction, on the present occasion, of acting in conformity with what I collect to have been the opinion of a very experienced Judge, Lord Cottenham, whose judgment has been cited in the argument. Whether a case for an extension of time can be made for the defendants, it is not for me now to decide. The question before me is, whether the plaintiff, by the present statements, is peremptorily excluded from having an answer; and to the affirmative of that question I cannot accede.

Exceptions allowed.

## Boyes v. Liddell.

MOTION that it be referred to the Master to inquire on a vendor's and state to the Court whether the plaintiff can make a good title to the hereditaments and premises in question in this cause, and when it was first shewn that such title could be made, without prejudice to any question in the cause.

On a vendor's bill for specific performance, the Court will not, either uncerthed and premises in question in this cause.

The bill was filed to enforce the specific performance of May, 1839, an agreement entered into by the defendant for the purchase of a freehold estate at Lochton, in the county of the hearing, if the defendant York. The premises had been intended to be sold by auction, but were sold to the defendant by private contract; the conditions of sale, so far as they were applicable, being made part of the contract, and the contract being dated the 22nd December, 1840.

Order of 9th May, 1839, granta reference as to title before the hearing, if the defendant resists the specific performance on other than that of title, and the 22nd December, 1840.

By the conditions of sale it was stipulated, that the balance of the purchase-money, after payment of the deposit, should be paid on the 6th April then next, at which time

Dec. 11th.

bill for specific performance. the Court will not, either under the old practice or under the 5th General Order of 9th May, 1839, grant a reference as to title before the defendant resists the specific performance on other grounds than that of title, and the Court, on looking at the answer, is of opinion that such other merely frivolous.

5 Feer

BOYES

S.
LIDDELL.

the purchase was to be completed. That the vendor should deliver an abstract of title on the 10th of January; and that the purchaser should, within one month of the delivery of the abstract, give to the vendor's solicitor a statement in writing of all objections (if any) to the title, and in default of so doing, should be considered as having accepted the title; but that no objections were to be made as to matters provided for by the conditions.

On the 9th of January an abstract of title was delivered. On the 3rd of February, the plaintiff's solicitor received from the defendant's solicitors a series of objections, which had been taken by their conveyancer to the title. At the foot of the objections, the conveyancer gave it as his opinion, that the abstract delivered was not such a proper and perfect abstract as the vendor ought to have delivered, and consequently, that the defendant was not bound by the condition for delivering objections to title within a limited time. The objections, therefore, were delivered with a request for a more perfect abstract, and a reservation to the purchaser of a right to make further objections.

Answers were returned to these objections by the plaintiff's solicitor, which, however, were unsatisfactory to the defendant's legal advisers; and, after a correspondence between the respective solicitors, which was continued beyond the 6th of April, the time fixed for the completion of the contract, the defendant's solicitors, by a letter dated the 5th of May, announced that their client rescinded the contract.

A bill having been filed for specific performance of the contract, the defendant by his answer set forth his conveyancer's objections verbatim; and he stated that he had since the filing of the bill, for his own private satisfaction, again applied to his conveyancer, who remained of opinion that a good title had not yet been made. The defendant, therefore, submitted that the bill should be dismissed with costs; insisting, however, that, even if the plaintiff had made out or

was now able to make out a good title, which the defendant denied, he had not so done within the time limited by the terms of the contract, or prior to the 5th of May; and that under such circumstances, regard being had to the laches and delay of the plaintiff, the defendant was justified in rescinding the contract on the said lastmentioned day, and in insisting that it was void; and he submitted that he was not bound to be kept further in suspense, or to have the estate forced upon him at an unprofitable season of the year. And he submitted, that, if the Court should be of opinion that the contract was still subsisting, and that time was not of the essence of the contract, he was entitled to compensation.

It was admitted on the pleadings, that the defendant's solicitors on the 5th February wrote to the plaintiff's solicitor, stating, that their client was a willing purchaser, and only wanted a marketable title, and suggesting that, as the vendor, considering the season of the year, "might not be able to get all done in the time limited for the completion of the purchase," some arrangement should be made for keeping the land in the usual course of husbandry. It did not appear, however, unless this letter had that effect, that the defendant had ever expressly waived any of the stipulations as to time.

Mr. Swanston and Mr. Smythe for the motion.—The plaintiff is entitled to a reference as of course. The defendant's objections, except as to the question of title, are, as we say, merely frivolous, and the Court will look into the answer to see whether they are so or not. Withy v. Cottle (a). [The Vice-Chancellor.—I am clearly at liberty to do so.] Then the question is, whether time was in this case of the essence of the contract. We submit that it never was made so by the form of the contract, and that it never was treated so by the defendant till the bill was filed. By the

BOYES
S.
LIDDELL.

<sup>(</sup>a) Turn. & Russ. 78.

BOYES v. Liddell.

letter of the 5th of February, the defendant's solicitors actually suggested an extension of the time. The plaintiff, therefore, is entitled to the reference as prayed. [The Vice-Chancellor.-If the defendant is right in what he contends for, a title made good between the present time and the time of the report would be useless.] In Foxlowe v. Amcoats (a), though it is otherwise stated in the printed report (b), the reference was in that form, under precisely similar circumstances. [The Vice-Chancellor.—According to the report, that was anything but a common order. The motion was made, not under the old practice, but under the 5th of the Orders of 9th May, 1839; and the inquiry was, not whether the plaintiff could make a good title, but whether, and when first, he had shewn a good title.] The inquiry in that form would clearly not be useless, and we should be content to take it so.

## Mr. Mylne, for the defendant.

THE VICE-CHANCELLOR.—This is a vendor's bill for specific performance. The contract is composed of conditions intended to apply to a sale by auction, which are embodied in the private agreement. The conditions are strict in point of time and otherwise against the purchaser. has entered into the contract, and probably has no right to complain of it. The nature of the conditions I do not say will, but may possibly, form a reason for applying the rule as to time strictly against the vendor. That may or may not be so. The title was not completed when it ought to have been, strictly, according to the stipulation as to time. When the time arrived, the purchaser does not appear to have insisted on the objection. The vendor was allowed to cure several of the defects. When he had proceeded a certain length in doing so, the purchaser

<sup>(</sup>a) Rolls, 25th Nov. 1838.

3 Ana. 496 -

<sup>(</sup>b) 4 Jurist, 1053.

claimed a right to put an end to the contract. He did, or professed to do so, on the 5th of May, and he insists that he had a right to do so, and that he never was in possession.

BOYES

v.

LIDDELL.

The case is open to two considerations: one independent of the 5th of the Orders of the 9th May, 1830, and the other depending on that Order.

The vendor has moved for a reference as to title, insisting that there is no objection but that of title, and that the defendant's claim to rescind the contract, whether the title is now bad or good, is merely frivolous. I do not now decide whether that defence made by the purchaser will or will not be available. By the old practice, I have only to consider whether the defence is worthy of argument. That is the only point to be considered; for this is not the period when the question as to the validity of a defence, not plainly and merely unsubstantial, can be decided adversely to the purchaser. That can only be done at the hearing; and not being of opinion that the purchaser's objection is so merely frivolous as has been represented, I cannot say that, according to the old practice, this is a case in which the Court would grant a reference on such an application.

But then it is said that the case is within the terms of the 5th of the general Orders of 9th May, 1839. It does not appear to me that this is so. That Order enables the plaintiff to move for and obtain an order for preliminary accounts and inquiries, "without prejudice to any question in the cause," if it shall appear to the Court that such order is consented to, or "is proper to be made upon the statements contained in the answer." How can I make an order as sought, without prejudice to the question in the cause? In one view which the Court might take of the case, the order might be useless, and the time employed under it might be thrown away upon frivolous matter. In my judgment, the time of judicial officers should not be so employed.

BOYES

U.

LIDDELL.

With a view, however, to obviate this objection, I am asked by the plaintiff's counsel not to make an order in the form required by the notice of motion, but to do that, which, in any event, must be of use, namely, to direct an inquiry, whether on the 5th of May, or on an earlier day, a good title had not been shewn. The observation may be true, that that inquiry would in any view of the case be, in a sense, not useless; but is it right? The questions are as to title and time, and it seems to me, that to direct a reference to the Master in the middle of the cause merely as to the state of the title on a particular day, notwithstanding that it is not shewn or admitted that an answer to that question will decide the cause, would be a novelty, not merely not beneficial, but probably leading to inconvenient results. In my view of the case, I cannot make the order either in one shape or the other.

Motion refused.

Dec. 11th,
13th.

Specific performance decreed of a parol agreement deposed to by the plaintiff's witnesses, but denied by the answer; the agreement constituting a material part of the consideration for which the plaintiff had assigned his lease to the de-

## CLIFFORD v. TURRELL.

THE bill stated that the plaintiff, being a tenant of Mr. Du Pré, under a lease for fourteen years, at a rent of £240, for the payment of which the defendant, his brother-in-law, was surety, became indebted to the defendant in 1828 in two sums of £750 and £250, for money lent and rent paid; and that, for securing £1000, the amount of these sums, with interest, the plaintiff, in April, 1828, gave the defendant his warrant of attorney. That in January, 1830, there being an arrear of interest due on this security, the

fendant, although such consideration was not expressed in the deed of assignment.

Where there is one consideration stated in a deed, proof may be given of any other consideration which did take place, and which is not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.

A bill in equity may lie to recover the arrears of an annuity, although, under the circumstances, the plaintiff may have no right to call on the Court to direct security to be granted for payment of such annuity.

44.9 1. Ch. 99m. 633

defendant levied execution on the plaintiff's household furniture and farming stock for the amount of 10811.7s. 8d. That the defendant, having by means of his execution taken away from the plaintiff all means of carrying on the farm for his own benefit, became and was very desirous to obtain from the plaintiff an assignment of the plaintiff's share and interest in the aforesaid farm and premises under the aforesaid lease, in order that he, the defendant, might carry on the farm for his own benefit; and that the plaintiff having married the sister of the defendant, he, in order to induce the plaintiff to assign the said lease to him, promised, both by himself and two or three other persons. that, if the plaintiff would execute an assignment of the said lease to him, he, the defendant, would allow the plaintiff an annuity or sum of £40 a year as long as he lived, and a house worth £10 a year to live in wherever he pleased. That the defendant was partly induced to make such promise to the plaintiff from the fact that the plaintiff had received £500 each from two of his children, to enable him to continue his said farm, and from the fear which he entertained that the plaintiff might procure a commission of bankrupt to be issued against himself, and by means thereof defeat the aforesaid execution of the said defendant upon his said warrant of attorney; and that the plaintiff having, from his aforesaid family connexion with the defendant, great confidence in his integrity, was induced by, and agreed on the strength of his aforesaid promise, to execute an assignment to the defendant of his share and interest in the said lease; and the plaintiff accordingly, on or about the 22nd day of January, 1830, made and executed some deed or indenture of assignment of his share and interest in the said farm, the contents whereof the plaintiff, having no copy in his possession, was unable to set forth.

The bill then charged, that although the execution was for the sum of 10851. 7s. 8d. only, yet the consideration of the assignment was 15401. 2s., being the appraised value of the

CLIFFORD

U.

TURBELL.

CLIFFORD

OL

TURBELL.

furniture and stock only, without the lease. That the plaintiff, however, had received no part of the difference, but the whole had been applied in illegal and improper payments or deductions; and that the defendant still claimed a balance due to him of £31, or thereabouts. That the defendant also refused to pay the annuity, or provide a house for the plaintiff, according to his agreement.

The bill prayed that the agreement might be specifically performed and carried into execution; that it might be ascertained what was due to the plaintiff for the arrears of his annuity, and for the rent of the house so agreed to be provided for him remaining unpaid by the defendant, and that the defendant might be decreed to pay the same; that the defendant might also be decreed to give security for the annuity and for payment of the rent, and that it might be referred to the Master to settle and approve such security accordingly.

The defendant, by his answer, positively denied that he ever agreed to pay the plaintiff an annuity, or provide him a house, as stated in the bill, or that he ever entered into any agreement of that or the like nature. He admitted that the levy was only for 10851. 7s. 8d., and that the consideration for the assignment was 1540l. 2s., and that the plaintiff had received no part of the difference; but he stated, that the lease was included in the valuation of the property, and that, at the time of the execution of the indenture of assignment, an account was stated between the plaintiff and himself, (which he had set forth in the schedule to his answer), shewing in what manner the sum of 1540l. 2s. was applied. The defendant then set forth the deed of assignment, bearing date the 22nd day of January, 1830, and made between the Sheriff of Buckinghamshire of the first part, the plaintiff of the second part, Mr. Du Pré of the third part, and the defendant of the fourth part, whereby, after reciting the indenture of lease, and that a writ of fieri facias

had then lately issued out of his Maiesty's Court of King's Bench, directed to the said Sheriff, commanding him to cause to be levied of the goods and chattels in his bailiwick of William Clifford, as well a certain debt of £1000, which the defendant had recovered against him in the same Court, as also 65s. for damages and costs; and which said writ was returnable before our said Lord the King at Westminster on Saturday then next after eight days of Saint Hilary then next ensuing, and was indorsed—" Levy 10811. 7s. 8;" and, reciting that the said Sheriff had, by virtue of the said writ, seized and taken in execution the said indenture of lease, and the term of years thereby granted, and the household furniture, stock in trade, farming implements, and other effects of him the said plaintiff, in, upon, and about the dwelling-house, farm, and lands in his occupation as aforesaid; and reciting that the said Sheriff had, at the request of the defendant, contracted and agreed for the sale to him the defendant of the said indenture of lease, and the term of years thereby granted, and all benefit and advantage thereof, and the said household furniture and other effects so seized by him the said Sheriff as aforesaid, at or for the price or sum of 1540l. 2s., the amount at which the same had been valued and appraised by John Everett, James Rolfe, and John Rolfe respectively, and that the defendant had agreed to take an assignment thereof in satisfaction and discharge of the said levy, and the amount paid by him for Sheriff's poundage and other incidental expenses attending the said sale: it was witnessed, that, in consideration of 1540l. 2s. to the Sheriff in hand paid by the defendant, to be applied in satisfaction and discharge of the said debt and damages, the said Sheriff did, with the consent and approbation of the said James Du Pré, as far as in him lay, and by virtue of the power and authority in him vested in and by the said recited writ, and also by virtue of the statute in that case made and provided, bargain, sell, assign,

CLIFFORD D.

CLIFFORD

U.
TURBELL.

transfer, and set over, and the plaintiff, in consideration of 10s. to him, paid by the defendant, did bargain, sell, assign, transfer, set over, ratify and confirm unto the defendant, his executors, administrators, and assigns, all those the said messuages and premises demised by the said indenture of lease, and also all the household goods and other effects and premises which had been taken in execution as aforesaid; to hold the same unto the defendant, his executors, administrators, and assigns, for all the residue of the said term of fourteen years, subject to the payment of the rent and performance of the covenants.

The account contained in the schedule was made up of the sum comprised in the levy, two sums of £120 and £240, paid by the defendant to Mr. Du Pré for the plaintiff's rent, and several sums for poundage, solicitor's fees, &c.

The plaintiff proved the agreement, as laid in the bill, by the evidence of John Rolfe, James Rolfe, and John Everett, the persons who had been employed by the defendant to value the stock and furniture. The evidence of these witnesses was very circumstantial; and, with the exception noticed in the judgment, perfectly consistent. The plaintiff, also, with a view to shew part performance of the agreement by the defendant, proved several payments by the defendant to the plaintiff's wife; but it appeared from the defendant's evidence, that these were made when the plaintiff and his wife were living separate, and merely as gratuities to the wife.

The defendant had no evidence to contradict the plaintiff's witnesses. His solicitor stated, that through the whole course of the transaction he had never heard of such an agreement as that stated in the bill; but it appeared, that, though the assignment was executed at his office, he was not actually present at the execution.

Mr. Cooper, and Mr. Tripp, for the plaintiff.—The Court has jurisdiction to grant specific performance: Ball v.

Coggs (a); Adderley v. Dixon (b). Considering the part performance of the defendant, the plaintiff has a right to have some instrument given him, to establish his right to the annuity. It was clearly meant that he should have some security. At all events, the Court will entertain a bill, which has for its object the receipt of the purchase-money under an agreement. Wherever there remains something to be done, the Court will entertain jurisdiction. It is clear, from the circumstances in this case, that the plaintiff did not receive full consideration for the assignment. [The Vice-Chancellor.—According to the deed, the entire consideration was the £1542; but evidence may be given to shew the true consideration: Rex v. Scammonden (c).] Here, the sheriff levied for more than the amount of the debt; and there are other circumstances, independently of the evidence, which shew that the mere consideration is not stated in the deed. The plaintiff assigns by the deed, for a nominal consideration; but it is perfectly consistent with that, that there may have been a pecuniary consideration. Considering all the circumstances and the evidence, the plaintiff is entitled to a decree. [The Vice-Chancellor.—Have you any cases to shew, that this Court will direct payment of an annuity, without directing any security?] Lady Herbert v. Powis (d) is in point.

CLIPPORD V.
TURRELL.

Mr. Simpkinson, and Mr. Chandless, for the defendant.—This is not a bill to impeach the deed, or to have the sale declared void; but it calls on the Court to perform a parol agreement varying essentially from the terms of the deed of assignment. The agreement as stated in the bill appears to have been entered into without consideration, and it varies in essential particulars from the agreement proved by the plaintiff. As set out in the bill, it is totally

<sup>(</sup>a) 1 Bro. P. C. 140. (b) 1 S. & S. 607. (c) 3 T. R. 474. (d) 1 Bro. P. C. 355.

CLIFFORD v.
TURRELL.

silent as to the stock and furniture; it is a bare agreement, that, in consideration of the plaintiff agreeing to join in the assignment of the lease, the defendant shall grant him an annuity, &c. But the lease being worth nothing, the whole consideration for the agreement stated in the bill is void; and the Court cannot decree specific performance in favour of a party from whom no consideration moves. There are other parts of the agreement as proved, which are not stated in the bill; for instance, the defendant's agreeing to appoint the plaintiff's son as bailiff of the farm, &c. Then, it is said, the payments to the wife were in part performance of the contract to pay the annuity; but the letters of the plaintiff clearly shew. that he claimed no right to these payments, and that they were the result of the defendant's bounty. Upon the whole, to decree in favour of the plaintiff would be to break through the ordinary rules of evidence, by allowing parol testimony to contravene the express terms of a deed. Besides, the agreement sought to be enforced is uncertain in its nature. An agreement to find a house, worth £10 a year, is like a covenant to rebuild or repair; which the Court will not execute. If any term be of an uncertain nature, the Court will refuse to execute any part: Kimberley v. Jennings (a).

THE VICE-CHANCELLOR, after reading the agreement as stated in the bill, proceeded as follows:—It has been agreed at the bar, that, having regard to the state of the pleadings and the circumstances, the Statute of Frauds, and the act relating to the memorializing of annuities, are out of the question in the present case. It may be convenient to consider, in the first place, before the objections in point of law are mentioned, whether the agreement stated in the bill is proved in point of fact; because the de-

fendant, by his answer, positively denies the agreement. There are certain facts, however, common both to the plaintiff and the defendant—facts, in which both are agreed.

CLIFFORD P.
TURRELL.

The plaintiff was a farmer in Buckinghamshire, and had married a sister of the defendant. He occupied a farm at Wooburn Green, which was held by a lease from Mr. Du Pré. Of that lease, in 1829, several years were unexpired. The defendant had become surety for the plaintiff to Mr. Du Pré for the payment of the rent, the amount of which was £240 per annum.

The plaintiff, as appears from the evidence, was not a prudent man, or a good manager, and fell into difficulties. In 1829, besides the rent for his farm having fallen into arrear, he was indebted to the defendant for money lent, which was secured by a warrant of attorney and judgment.

In this state of things in 1829, the defendant appeared to think it best for himself, and probably also for the family of the plaintiff, that the farming business, carried on by the plaintiff, should be put an end to; and, accordingly, he issued a writ of *fieri facias* upon the judgment in November, under which the sheriff of Buckinghamshire seized the plaintiff's effects.

The farming stock and furniture, it is agreed on all hands, were included in the seizure. It is said on the one hand, and denied on the other, that the lease was included; but, in the view which I take of the case, that is not material. It is agreed on all hands, at least it is clearly proved, that the lease was worth nothing. The stock and the furniture were of considerable value, and were appraised—and, as it seems to me, fairly appraised—at a sum exceeding by several hundred pounds the total debt and costs for which the levy was made. There is no occasion, therefore, to deal with the question, whether the term was or was not of value, or whether it was or was not seized;

CLIPPORD v.
TURRELL.

because the debt and costs were exceeded by the value of the goods unquestionably seized.

Negotiations were pending for several weeks, during which the sheriff was in possession; a treaty was entered into, relating not merely to the debt of the defendant, but to a much more general and extended arrangement as to the plaintiff's affairs; as the defendant was surety for the plaintiff's rent, and the rent would be payable to the land-lord for some time to come.

This treaty produced the deed which is part of the case on both sides—the deed of assignment of the 22nd January, [His Honour here read the names of the parties to and the recitals of the deed.] The conclusion of these recitals is singular. [His Honour then read the operative part of the deed.] The case, as far as I have stated it, is common to both parties. It may be mentioned, however, that the sum of 15421. 2s., which is stated by the deed to have been paid to the sheriff, is accounted for by the defendant in the account stated in the schedule to his answer, in the following way:---[His Honour here read the account.] Now, this being part of the case as proved, without dispute or question, it is plain that the deed does not exhibit the whole of the transaction as it was-that is clear. The contention between the parties arises thus. The plaintiff says he was unwilling to execute the deed; for that to have given up his farm, and everything upon it, would have left him without occupation, without a home, without the means of obtaining bread. He appears to have intimated that he could have had a commission of bankrupt issued against him, (whether he could or not, does not appear), by which the execution might have been defeated, and he might have reduced Turrell's means of paving his debt. He alleges that, after having refused to execute the assignment, he was induced to do it by a promise from the defendant of an annuity of £40 a year for his life, and a house worth

£10 a year, and that, relying on this collateral promise, he executed the deed. This the defendant denies.

CLIFFORD

TURRELL.

Now is that agreement proved in point of fact? It is proved by three witnesses, each of whom appears to be a person of respectability, John Rolfe, James Rolfe, and Everett, who were the persons employed as valuers. In saying that they prove the agreement, I lay no stress upon the conversations which have been given in evidence, because they are not put in issue; but, without allowing any weight to them, I find three witnesses distinctly proving the agreement stated in the bill, subject only to an observation which I shall make presently. These three witnesses have been cross-examined, which has only tended to confirm their testimony, not only by enabling them to repeat their statement, but by shewing what was in the defendant's mind and knowledge when he examined them. Independently of cross-examining them, he has examined each of the three in chief; therefore, each of the three has been three times examined.

Considering, then, that these three persons of respectability one and all speak plainly to this fact, it would be too much to say that the agreement is not proved. If it were less distinctly proved, I should have been of opinion that great weight was due to the observations made at the bar. upon the subject of the plaintiff's letters, and the line of conduct pursued by all parties; because, not only the letters shew no claim except on the bounty of the defendant, but the defendant appears to have considered himself as the master of the allowance, (if I may so speak), as the regulator of what he treated as his own bounty, and as entitled to give it to his sister in such manner as he thought fit. I repeat that I should have given great weight to this part of the evidence, both written and oral, if the testimony of the Rolfes and Everett were less clear and distinct. Seeing what it is, it would be unsafe to suffer it to

CLIFFORD

TURBELL.

be shaken by a mere inference drawn from the letters and conduct to which I have referred.

It is said that the agreement proved is not the agreement alleged; that the agreement alleged is simply for an annuity of £40, and a house of £10 per annum, in consideration of the assignment, whereas the agreement proved contains the additional term of employing the plaintiff's son as bailiff, and disposing of the profits for the benefit of the family. But these are additions for the plaintiff's benefit, and not for the defendant's advantage, leaving untouched the fact of the agreement as to the annuity and the house; and I do not think that the circumstance of the terms of the agreement being thus extended by the evidence of the witnesses makes any difference.

I was struck at first by the difference of the answer of James Rolfe in his examination in chief, from that given in his cross-examination, and that of the other witnesses. Considering, however, that, when by his deposition he stated £50 as the amount of the annuity instead of £40, he was not examined upon the particular point, because the interrogatory then administered to him had other objects—considering the distinct manner in which, upon his cross-examination, he states the amount, and the clear manner in which the others speak, I think that the just and unavoidable inference is, that there is a mistake in his first deposition, and, therefore, that the circumstances elsewhere deposed to are not impeached, and the agreement not rendered uncertain by this part of his evidence.

It is then said, that, supposing the agreement to be proved in fact, there are objections in point of law to the reception of the evidence, because it is contrary to the tenour of a solemn deed executed by the parties. It is clear, even in cases where the Statute of Frauds does not apply, that the rules of law may exclude parol evidence, where a written instrument stands in competition with it: but it has long been settled, that it is not within any rule

of this nature to adduce evidence of a consideration additional to what is stated in a written instrument. Rex v. Scammonden (a) is not the only case which establishes that proposition. The rule is, that, where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated. Taking therefore the evidence to prove an additional consideration beyond the consideration expressed in the deed, there is no sound objection in law to affect the reception of that evidence. It is true, the deed states that the lease was included in the levy. Whether it was or was not, is immaterial in my judgment. I should think, that, if it was not included in the levy, the plaintiff would not be estopped here from shewing that fact. Taking it that it was included in the levy, it is not contested that the lease was worth nothing-it is not contested, that the debt for which the security was given, was considerably less than the amount of the stock and furniture; and hence, perhaps, it might be considered advisable, that the title should not be taken from the sheriff alone, without the concurrence of the plaintiff.

1841. CLIFFORD 5. TURRELL.

Upon the whole, I think the evidence receivable, notwithstanding the words of the deed, to shew that the plaintiff had objected to execute the assignment, until a collateral promise had been made to him, to allow him an annuity of £40 a-year, and a house worth £10 a-year. I think the promise was binding though the lease was worthless, and that the worthlessness of it did not make it less an object to the surety to obtain an assignment of it. I conceive, therefore, that the plaintiff is entitled to the benefit of the agreement.

At one period of the argument I felt some difficulty,

1841. CLIFFORD 2. TURRELL. whether, this transaction having occurred long ago, and it being a mere pecuniary demand, there was on that ground any equity to support the bill: but, upon the pleadings being brought more fully before the Court, and the matter being more fully discussed, I am satisfied that this is a case in which the Court ought not to decline jurisdiction. A case is stated, in which, setting the Statute of Frauds out of the question, a bill might have been maintained by the defendant against the plaintiff, to compel him to execute the assignment. That, therefore, is a reason to compel the performance of the terms upon which the plaintiff agreed to execute the assignment. A case also has been referred to, which was decided in the House of Lords, in which payment of the arrears of an annuity was enforced by a bill in equity. For these and other reasons stated in the argument, though these are enough, I am of opinion, that the Court ought to exercise jurisdiction in this case. Therefore-

Decree specific performance of the agreement; take an account of what is due for arrears of the annuity; let the defendant have credit for what he has paid the plaintiff's wife; direct an annuity of £40 a year to be paid to the plaintiff for the future, and let the defendant have the option of finding a house of the value of £10 a year for his life. Considering that the plaintiff has asked more than he is entitled to, by claiming security for his annuity, and has made charges against the defendant which he could not establish, and considering also the general complexion of the case, let there be no costs on either side up to the hearing.

1841.

## HOLLAND V. CLARK.

SARAH CLARK by her will dated the 5th of January, 1811, after making several pecuniary and specific bequests. and devising certain real estates to her two sons, James and gacy to a wo-John Clark, gave and bequeathed to them the rest, residue, and remainder of her goods and chattels, ready money, in December, stock in trade, and all other her personal estate and effects whatsoever and wheresoever, to and for their own use and gave the plainbenefit, they paying thereout the legacies thereinbefore be- knowledgment queathed, as they should become due; amongst which was a legacy of £150 to Susannah Clark, daughter of the testatrix's son Joseph Clark, when she should attain the age owed the plain-

Dec.14th.17th. 1842, Jan. 11th. H. died in 1811. having be-queathed a lewards married 1825, the two executors of H. tiff a written acwhereby they separately and jointly acknow-ledged that they tiff £150 for

£50 for interest. In 1835, the plaintiff's wife died. Matters of business having occurred between the plaintiff and the executors. in which mutual demands and account and acc tember, 1839, brought his action against the executors to recover what he alleged to be due on those accounts, including the £200 mentioned in the memorandum, and interest thereon. In this action the defendants pleaded separately, and one of them paid £46 into Court, which the plaintiff received and abandoned the action as to him. The plaintiff them filed his bill against both defendants for payment of the legacy, and in defence to the bill the defendants, amongst other things, insisted by their answers on the Statute of Limitations (stat. 3 & 4 Will. 4, c. 27), and that the action was a bar to the demand in equity:—Held,

1st. That the written memorandum amounted to an acknowledgment taking the claim to the legacy out of the operation of the statute.

2ndly. That, whether it amounted to an admission of assets or not, it gave the plaintiff no right of action.

3rdly. That, unless equivalent to an admission of assets, it did not create a personal demand

against the defendants, enforceable in a Court of Equity.

4thly. That it had not the effect of barring or prejudicing the right of the plaintiff's wife in

the legacy, or his title in right of his wife as a legatee.

5thly. That the proceedings in the action did not necessarily amount to an estoppel of the suit in equity, but that, in order to determine the efficacy of the suit, it was competent for this Court

in equity, but that, in order to determine the emeacy of the suit, it was competent for this Court to inquire on what account the £46 was paid into Court in the action.

6thly. That the plaintiff was not entitled to arrears of interest on the legacy beyond six years before the filing of the bill. (See stat. 3 & 4 Will. 4, c. 27, sect. 42.)

In order that an acknowledgment may have the effect of taking a demand out of the operation of the Statute of Limitations (stat. 3 & 4 Will. 4, c. 27), the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand. Therefore, where a bill was brought against two executors for payment of a legacy bequeathed to the plaintiff's wife, and for arrears of interest accrued since her death, and the plaintiff, with a view of taking his demand for interest out of the operation of the 42nd section of the statute, relied on certain letters written by one of the executors to his the plaintiff's attorney:—Held, 1st. That the letters had not the effect ascribed to them by the plaintiff, because they had been written by the party, not for the purpose of charging himself, but of throwing the burden of payment on the co-executor. 2ndly. That even if they had been written for the purpose of charging himself, it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out letters of administration to his wife.

HOLLAND B. CLARK. of twenty-one years, with a gift over in the event of her dying under that age; and the testatrix appointed her said sons James Clark and John Clark executors of her will.

The testatrix died soon after the date of her will, which was duly proved by James and John Clark on the 17th January, 1811. Susannah Clark having survived the testatrix, and having, as it appeared, attained the age of twenty-one in 1819, married George Holland in the year 1820, and died in June, 1835.

The bill was filed on the 25th April, 1840, by George Holland, as administrator of his late wife, against James and John Clark, praying payment of the legacy, with interest from the time of his wife attaining twenty-one, and, if necessary, that the usual accounts might be taken of the personal estate of the testatrix.

The bill alleged that the plaintiff, after his marriage, frequently applied to the defendants for payment of the legacy and interest, and that, although the defendants did not pay it, they nevertheless acknowledged the plaintiff's right to receive and be paid the same out of the testatrix's assets, which they admitted were fully sufficient for that purpose; and, particularly, the defendants on the 25th of December, 1825, duly signed and delivered to the plaintiff an acknowledgment in writing, in the following terms:—

"Hornchurch, December 25th, 1825.

"We separately and jointly acknowledge we owe Mr. George Holland of Stifford, Essex, the sum of £150, being a legacy left to his wife by the late Mrs. Sarah Clark, of Hornchurch, Essex, and £50 interest thereon to the above date.

(Signed) "James Clark, Executors."

The bill further stated that the defendant John Clark, on or about the 22nd July, 1838, wrote and sent to Mr. Wadeson, the plaintiff's solicitor, a letter of that date in the following terms:— HOLLAND 7. CLARK,

"SIR,—I have looked into my late mother's will, and it appears to me, that she did not charge the legacy given to the late Mrs. Holland upon her real estate. My impression is, and always has been, that it was payable out of her personal estate; and I believe it was the impression also of Mr. Holland and my brother, when we gave Mr. Holland our promissory note for the legacy, payable with interest, which Mr. Holland now holds. I should think that instrument will enable him to recover the amount. As Mr. Sterry has been applied to by you on the subject of Mr. Holland's debt, I conjecture it must have been in consequence of my brother's application to that gentleman. I will, therefore, write to Mr. Sterry to-day, and inform him that I do not object to Mr. Holland's demand, and that I shall expect my brother to pay it, relying, as I do, upon the indemnity given to me, which Mr. Sterry prepared.

(Signed) "JOHN CLARK."

The bill charged, that, although more than twenty years had elapsed since the legacy first became payable, yet, by the written acknowledgment of the 25th December, 1825, the plaintiff's right to the legacy and interest was duly acknowledged by the defendants within the true intent and meaning of the Statute of Limitations, so as to prevent the plaintiff's right from being barred; and, further, that the letter of John Clark to Wadeson likewise operated to prevent time being a bar to the plaintiff's claim. The bill also charged, that, by signing the acknowledgment, the defendants had admitted assets, and that they had also on other occasions admitted assets.

The two defendants put in separate answers. Both admitted that the legacy had not been paid, and that they had signed the memorandum of the 25th of December,

HOLLAND CLARK. 1825. John Clark, however, denied assets. James, on the other hand, admitted them.

The case which John Clark made by his answer, (of which the parts within inverted commas were read by the plaintiff), was as follows:--"That he and his brother had been for many years in partnership as farmers and millers, and had had many dealings with the plaintiff in the way of business, and that in December, 1825, they had come to a partial settlement of accounts with the plaintiff, when they made and gave him the memorandum or acknowledgment set out in the bill." That after the memorandum had been given, the dealings between the plaintiff and the defendants continued as before till the end of 1835, during the whole of which time the amount mentioned in the memorandum was treated and acknowledged by the defendants as their personal debt. "That in July, 1836, it was agreed that the partnership between the defendants should be dissolved, upon the terms of John giving up his share of the farming stock and crops, and James paying every debt and demand which might be due from them to any person whatever, including, as the defendant insisted, the demand of the plaintiff. That this agreement was carried into effect by a deed, dated the 80th September, 1886." That the plaintiff had notice of this arrangement, and for some years afterwards applied to James alone for payment of the debt, but that, on failing in his application, he in April, 1838, delivered an account to him, the defendant John, claiming a balance due to him of £365, including the legacy and interest. That, nevertheless, he the defendant, unless he should be held liable on the memorandum of the 25th December, 1825, denied that anything was due from him to the plaintiff, but on the contrary, he alleged that, if the account were taken, the plaintiff would be found indebted to the defendants in 371. 8s. "That on or about the 18th day of June. 1839, the plaintiff, by letter written to and now in the defendant's possession, fixed the Tuesday following to meet the defendant, for the purpose of arranging the plaintiff's account; at which meeting, the plaintiff requested that Mr. Jonathan Kitching, the defendant's brother-in-law, should be present; and that Mr. Kitching accordingly met the plaintiff and his friend, Mr. Smith, and at the meeting the defendant, Mr. Kitching, and the plaintiff examined and discussed every item in the plaintiff's account; and the defendant soon after the meeting received from Mr. Kitching an analysis of the plaintiff's account, shewing the true result of such examination and discussion; and the minute is in the words and figures following, that is to say:—

HOLLAND 9. CLARE.

James and John Clark, in account with George Holland.

Dr. Cr.

1830, 1831, 1832, 1834, By Error, . . . £3 19 0

1835, to Goods, . . . £79 2 1 By James and John

Balance in favour of James Clark's account . 112 11 10

£116 10 10 £116 10 10

James Clark, in account with George Holland.

1828. Cash by Checks, . £37 8 0

James and John Clark as Executors.

Drs. To amount of Legacy 150 0 0
Interest . . . . 50 0 0
Interest on £150 from
25th Dec., 1825, to
25th Dec., 1839, 14
years, at 4 per cent., 84 0 0

and at this interview the plaintiff expressed himself satisfied with the result of the examination of the said account: and it was then agreed between the defendant and plaintiff, that the defendant, James Clark, should be required and compelled to pay what was justly due to the plaintiff upon his said account, in performance of the stipulations contained in the deed of the 30th September, 1836, and that HOLLAND 5. CLARK.

the defendant should give to the plaintiff every information and assistance in his power to enable the plaintiff to recover from the other defendant, James Clark, what was justly due to the plaintiff. And this defendant further saith, that, pursuant to such last-mentioned agreement, the plaintiff did, as this defendant has been informed and believes, instruct his attorney to write and send to this defendant a letter, addressed to this defendant and to the defendant James Clark, which is now in this defendant's possession, which is in the words and figures following: that is to say,—Romford, 20th June, 1839," &c. fendant then set forth a correspondence, the whole of which was read by the plaintiff, between Mr. Wadeson, the plaintiff's attorney, and himself, and also between his brother and himself, respecting the plaintiff's "claims and demands," "the liquidation of his demand," "his debt," &c. course of this correspondence, the defendant used the following expressions:—"It is my wish that his account should be both adjusted and liquidated, and Mr. Holland knows that Mr. James Clark is the person by whom both these things should be done. Every facility I can afford Mr. Holland to attain these objects I will readily give him."

The last letter set out in this answer was that of the plaintiff's attorney, to which the letter of the defendant, John, set out in the bill, was in reply. It was dated the 19th July, 1835, and was in the following terms:—

"Sir,—On Wednesday last, I had an interview with Mr. Sterry on the subject of Mr. Holland's demand against yourself and brother; and the only question seemed to be, by whom, with reference to the arrangement made between yourself and brother on the dissolution of your late partnership, the legacy given to Mr. Holland's wife, and the interest, should be paid. I understand that the legacy is charged upon the real estates devised to you and your brother by Mrs. Clark's will; and that, upon the dissolu-

tion of your partnership, your brother gave you an indemnity against the partnership debts. The question is. whether that indemnity extends to the legacy and interest. I think not; but you will exercise your own discretion upon the subject. According to the statements furnished, some by Mr. Holland, it appears that, with the interest calculated to June, 1839, there is due to him upon the legacy and other accounts, 3851. 16s. 4d.; and Mr. Holland finding a difficulty on the part of Mr. James Clark in getting this matter brought to a close, he will be under the necessity of taking legal means for enforcing his demand; but being unwilling to adopt such a course, without giving you an opportunity of communicating with Mr. Sterry, he has authorized me to suspend proceedings for a few days. I rely therefore on hearing from you on or before Wednesday next."

HOLLAND V. CLARK.

The defendant, James Clark, by his answer, stated, that for ten years after the death of the testatrix he had maintained and educated the plaintiff's wife; and that, in a conversation which he had with her on the subject of the legacy on her coming of age, she admitted that he had expended on her much more than the amount of the legacy, and that she was in fact his debtor. That after her marriage, however, the plaintiff being very importunate for payment of the legacy, the memorandum in question was signed and delivered to the wife, under an express promise on her part that it should not be enforced. That no claim was made upon it during her lifetime, and that the plaintiff, for the first time, alluded to the legacy in June, 1837.

It was stated in the answers of both defendants, and proved in the cause, that in September, 1839, the plaintiff, who had not then taken out letters of administration to his wife, commenced an action against the two defendants for the recovery of 394l. 4s. 4d., the alleged amount

HOLLAND 0. CLABE. of his debt and interest; that, to this action, the defendants pleaded severally—John pleading nunquam indebitatus, the Statute of Limitations, and a set-off; and James pleading the same pleas, and also payment, except as to £46, parcel of the monies mentioned in the declaration, and as to the £46, payment of the same into Court, against the further maintenance of the action (a). Under the last plea, the sum of £46 was paid into Court by James, which sum the plaintiff accepted, and entered a nolle prosequi as to him for the residue of the action.

The defendant, John, insisted by his answer, that, inasmuch as this action was still pending, the plaintiff could not maintain a bill against him for the same matter. And James insisted, that the plaintiff's alleged right to the legacy was effectually barred and estopped by the action.

(a) The form of this plea is given by the 17th of the Reg. Gen., H. T., 1834. See 5 B. & Ad., Append. vi. It will be perceived from the judgment in the principal case, that this Court directed an enquiry on what account the £46 was paid into the court of law, under the plea of payment into Court. It seems that even at law the defendant will, in some cases, be required to shew distinctly on what account the money is paid in under such a plea. Thus, where an action is brought on a bill of exchange, and for money paid, money lent, &c., it seems that the defendant cannot plead payment into Court of part of the money demanded by all the counts, unless he shews distinctly what portion of the money paid into Court is to be ascribed to the bill of exchange, or plead specially to the bill of exchange, in case no portion of the money is paid into Court in respect

of such bill. The reason of this seems to be, that the plea of payment into Court does not, as to the money not covered by it, amount to a plea of non assumpsit; and that if it did, it would be no effectual plea to a count on a bill of exchange, as non assumpait cannot be pleaded to an action on a bill of exchange. See on this subject Jourdain v. Johnson, 2 C. M. & R. 564. Generally, however, where there are several counts for several causes of action, or where several breaches are assigned in covenant, the defendant may plead payment into Court of one entire sum, in satisfaction of all the counts or breaches. Marshall v. Whiteside, 1 M, & W. 188; 1 Tyr. & G. 485. See further on the subject of this plea, Sharman v. Stevenson, 2 C. M. & R. 75; Jones v. Reade, 5 Dowl. P. C. 216; Stephens v. Ufford, 7 C. & P. 97.

Both the defendants insisted, that the plaintiff's right to the legacy and interest was barred by the Statute of Limitations, and they submitted to the Court, although more than twenty years had elapsed since the legacy first became payable, whether, by the memorandum of 1825, the alleged right of the plaintiff to the legacy and interest was duly acknowledged by the defendants within the true intent and meaning of the statute, and whether the letter of the defendant John to the plaintiff's solicitor operated to prevent time from being a bar to the alleged right and claim of the plaintiff.

HOLLAND 5. CLARK.

In case the Court should be of opinion that the plaintiff was not barred of his title to relief by time or the effect of the action, the defendant James claimed a right of set-off in respect of the maintenance of the plaintiff's wife.

The plaintiff gave in evidence the memorandum of December, 1825.

The defendant, James Clark, proved that he had maintained the plaintiff's wife during the time mentioned in the answer. He also proved the proceedings in the action.

The defendant, John Clark, entered into no evidence.

Mr. Simpkinson, and Mr. Toller, for the plaintiff.—It will be said on the other side, that the action in the Exchequer is a bar to the present suit. First, taking the case as against John Clark, it is clear that he cannot take advantage of the nolle prosequi entered against his brother. The two defendants having pleaded severally, the nolle prosequi as to one would be no bar to further proceedings against the other. The doctrine on this subject is all comprised in the note to Salmon v. Smith (a); and the conclusion of the learned writer there is, that "a nolle prosequi is a partial forbestrance by the plaintiff to proceed any further as to some of the defendants, or to part of the suit; but still he is at liberty to go on as to the rest." If so, the plaintiff

<sup>(</sup>a) 1 Wms. Saund. 207.

HOLLAND F. CLARE. may elect to proceed in equity against John. [The Vice-Chancellor.—Is there any authority to shew that a bill may be maintained against one of two executors?] Cowslad v. Cely (a). [The Vice-Chancellor.—I think the coexecutor in that case must have been out of the jurisdiction.]

Taking the case as against both defendants, the action was brought by the plaintiff in his own name, and not either as the administrator of his wife, or against the defendants as executors of the testatrix. Even, therefore, if the proceedings in action destroyed the right to sue on the paper, the right to sue in this Court for the legacy would remain, unless barred by the statute (b). But nothing has occurred to bar the plaintiff's right. The memorandum of the 25th December, 1825, amounted to a promise by the executors to pay the legacy; and a promise by executors to pay a legacy is an admission of assets: Bothe v. Crampton (c); Curtis  $\forall$ . Blow (d). The claim of set-off to the legacy, raised by the defendant James, is nugatory, because there was a gift over of the legacy in case the wife died under twenty-one.

Mr. Swanston, and Mr. Keene, for the defendant, James Clark.—The sum of £46 was recovered in the action as the result of the whole demand; how, then, can the same demand be the subject either of another action or a suit in equity? If the argument on the other side is correct, a party who proceeds erroneously at law has an advantage. That cannot be so. If, by any error of his own, this plaintiff did not recover the full amount due to him, he must take the consequence of his wrong mode of proceeding: he can have no equity, by reason of his improvidence in going to law. The £46 were paid on an allegation that he other demands were paid. Suppose he had gone on

<sup>(</sup>a) Pre. Cha. 83.

<sup>(</sup>c) Cro. Jac. 612.

<sup>(</sup>b) 3 & 4 Will. 4, c. 27.

<sup>(</sup>d) 2 B. & Ad. 426.

1841.

HOLLAND

CLARK.

to verdict and judgment; this Court would not allow him to raise the question so brought into a court of law and disposed of. [The Vice-Chancellor.—There are cases in which parol evidence is receivable as to what was in question in an action. As in assumpsit, where the judgment is conclusive, but does not shew to what it relates, evidence may be given as to the subject of dispute. We submit. that the judgment passed for the particulars of demand. Of what use are the particulars of demand, unless they satisfy the Court on what it was that judgment passed? The plaintiff converted his equitable demand into a legal one. By his particulars of demand he claimed, instead of his legacy, a sum due upon a "memorandum of debt." The money paid into Court was paid in on every count. The plaintiff, therefore, having received that money, is estopped from any further proceedings: Skarratt v. Vaughan (a).

Whatever be the effect of the action, it is submitted that the admissions of John will not deprive James of the benefit of the Statute of Limitations, and that he is within the clause as to executors contained in the stat. 9 Geo. 4, c. 14, s. 1. Wyatt v. Hodgson (b); Tulloch v. Dunn (c).

Mr. Spence, and Mr. Lowndes, for the defendant John Clark.—To make this defendant answerable by reason of his letter of the 22nd July, 1839, would be to convert that letter from its proper purpose to a purpose not intended by the writer. At all events, in order to give it the effect contended for on the other side, the acknowledgment which it contains must have been made to the person entitled to receive the money: Whippy v. Hillary(d). Now, the plaintiff was not the party legally entitled to receive the money, inasmuch as he had not at that time administered to his wife. Besides, the correspondence

<sup>(</sup>a) 2 Taunt. 266.

<sup>(</sup>c) Ry. & Mood. 416.

<sup>(</sup>b) 8 Bing. 309.

<sup>(</sup>d) 3 B. & Adol. 399.

HOLLAND 6. CLARK. altogether is too vague to be relied upon as amounting to any admission of liability to pay the legacy. Ever since 1825, the demand has been treated as merely personal. It was comprehended in the action, and the equitable remedy for the legacy is, therefore, barred. If the plaintiff's demand in the action did not consist of the legacy and interest, as well as other matters, there would have been no balance due from James to the plaintiff.

Mr. Simpkinson, in reply.—It has been said on the part of the defendant, James Clark, that he is protected by the first section of Lord Tenterden's Act. That act, however, does not apply to legacies, but only to actions of debt and on the case. The bar in this case, if any, would be under the stat. 3 & 4 Will. 4, c. 27; but here there is a plain acknowledgment by John Clark, not only of principal, but of the interest due on the legacy. His acknowledgment, therefore, is clearly within the 40th and 42nd sections of that statute. Then, what is the effect of that acknowledgment? John is the "agent" of James, within the meaning of the statute; and, therefore, the acknowledgment is the act of James as well as of John. But, independently of that argument, the acknowledgment of John binds the estate of the testatrix, over which he, John, has an unlimited authority. One executor represents the whole estate. It is said, however, on the part of John, that his acknowledgment was not given to the person entitled to receive it, because the plaintiff had not taken out letters of administration to his wife. But he has since done so; and, therefore, the letters have relation back to the death of the wife. Then it has been argued, that that correspondence, taken altogether, is not sufficiently precise to amount to an acknowledgment of the legacy being payable, reference being made to accounts and demands of a general nature. If that were so, which is clearly not the case here, parol evidence would be admissible to shew to

what items in the account the acknowledgment referred: Lechmere v. Fletcher (a); Bird v. Gammon (b); Cheslyn v. Dalby (c).

HOLLAND v. CLARK.

On a subsequent day the case was, at the suggestion of the Court, re-argued by one counsel on each side.

Mr. Swanston.—First, the admission of assets, or any other act, by one of two executors, will not prejudice the testator's estate: Chaffe v. Kelland (d), Baldwin v. Church (e), Elwell v. Quash (f). In Lepard v. Vernon (g), this Court held that the assignment of part of the assets and judgment confessed by one executor, did not avail against the dissent of the others. This Court does not allow even a sole executor absolute power of charging the estate, as for instance, by admission: Putnam v. Bates (h). [The Vice-Chancellor.—Did this Court hold that the admission did not charge the personal estate?] That was not the question.

Admitting, however, for the sake of argument, that the defendants originally admitted assets, the parties in 1825 meet together, and the defendants acknowledge in writing that the plaintiff is entitled to receive a certain amount of principal and interest. They gave that acknowledgment personally. [The Vice-Chancellor.—What was the consideration for it?] The retainer. An action could be maintained upon it. In Hart v. Minors (i), a legacy was given to an individual. The executor had the money to pay it. He did not pay it, but acknowledged he was indebted to that individual; and upon that acknowledgment an action was brought and judgment obtained. The consideration was the legacy. That case did not involve, as

- (a) 1 Cromp. & M. 623.
- (b) 3 New Cases, 883; 5 Scott, 213.
  - (c) 4 Y. & C. 238.
- (d) 1 Roll. Abr. 929, Executors, (A.) pl. 1.
- (e) 10 Mod. 323.
- (f) 1 Stra. 20.
- (g) 2 Ves. & B. 51.
- (h) 3 Russ. 188.
- (i) 2 Cromp. & M. 700.

HOLLAND v. CLARK. this does, an additional account. Here, if the husband had died in the wife's lifetime, the wife's right would have been gone, and it would have been a chose in action of the husband recoverable at law by his representatives: Roper v. Holland (a).

Again, if the benefit of the Statute of Limitations is not ousted by the correspondence, here there is a patent uncertainty in the words "accounts" and "claims," which cannot be explained by parol evidence. In Hodges v. Horsefall (b), the agreement referred to a particular plan, and parol evidence was admitted to identify the plan. But the Courts will allow such parol evidence only for the purpose of connecting one document with another that is certain. If there are two accounts or matters, and it is uncertain to which the acknowledgment refers, parol evidence is not admissible to explain the uncertainty: that is clear from the observations of Littledale, J., and Parke, J., in Shortrede v. Cheek (c). If an acknowledgment does not state with certainty what it is that is acknowledged, parol evidence cannot be given of it. How does the Court know that the acknowledgment did not refer to all the particulars? Parol evidence may be given of the amount of a debt, but not to explain what accounts, claims, and demands are referred to. Besides, the acknowledgment must be given to the party entitled to sue. Here, when the acknowledgment was given, the plaintiff was not entitled to sue, not having taken out administration to his wife.

Mr. Simpkinson, in reply to Mr. Swanston, observed that the rule as to parol evidence being inadmissible to explain which of two accounts was intended, did not extend to the case of one demand consisting of several items. On the principal question, he contended that it would be monstrous to hold, that a document signed by two persons

<sup>(</sup>a) 3 Ad & Ell. 99. (b) 1 Russ. & M. 116. (c) 1 Ad. & Ell. 60.

in the character of executors, admitting in the character of executors £150 for principal and £50 for interest due on a legacy, was an annihilation of the claim of the legatee against the estate of the testatrix.

HOLLAND v. CLARK.

THE VICE-CHANCELLOR.—The bill in this cause, filed on the 25th April, 1840, by Mr. George Holland, as the administrator of his deceased wife, formerly Susanna Clark, seeks the recovery of the principal and interest of a legacy of £150 bequeathed to her by the will of her grandmother, Sarah Clark, who died in the year 1811. The executors appointed by this will were her sons, James Clark and John Clark, the defendants, who were also the residuary legatees. They proved the will in the same year, 1811. The legatee Susanna Clark was then a minor and unmarried. She attained majority (when her legacy vested) previously to her marriage with the plaintiff, which took place before the year 1825. The plaintiff has produced, and proved in the cause, a paper of the following tenor:—

"Hornchurch, December 25, 1825.

"We separately and jointly acknowledge we owe Mr. George Holland, of Stifford, Essex, the sum of £150, being a legacy left to his wife by the late Mrs. Sarah Clark, of Hornchurch, Essex, and £50 interest thereon, to the above date.

"James Clark,
"John Clark."

It is not disputed that this paper was signed by the defendants in December, 1825, or that it relates to the legacy in question. The legatee died in the year 1835; and in or after September, 1839, the plaintiff, who appears to have had various dealings with the defendants, commenced an action of debt against them jointly, in which certain proceedings were had. I shall presently advert to these more particularly. In this action, which was substantially terminated in May, 1840, the plaintiff did not

1842. Jan. 11th. Holland v.

sue as administrator of his wife. In fact, he did not sustain that character until some time after the action had been commenced.

By their answers, the defendant John Clark does not, and the defendant James Clark does, admit assets. The admission of assets by the latter in his answer is in effect thus:—that the two defendants possessed all the testatrix's personal estate not specifically bequeathed, which came to their knowledge, and that it was sufficient to answer and satisfy all her just debts and funeral and testamentary expenses, and the legacies bequeathed by her will.

The defendants, I think, must be taken to claim by their answers, the benefit of the stat. 3 & 4 Will. 4, c. 27; but they also contend that the effect of the paper of 1825, accepted as it was, though not signed, by the plaintiff, was to give him an action at law, and to convert the demand for the legacy into a mere debt, so as to exempt them from being sued here; and that the proceedings at law, including the payment by James Clark into Court in the action, and the acceptance by the plaintiff of a sum of £46, amount to a conclusive bar against him, if he could otherwise have sued in equity. The question has also been argued, whether the paper of 1825 ought to be treated as an admission of assets by the defendants. It is clear, that the document of 1825 precludes the defendants from all benefit under the 40th section of the Statute of William the Fourth. With regard to the question of admission of assets, it was my impression during the argument, that the paper did not amount to such an admission. Subsequent consideration of the case, and of the authorities to which I have referred, has not confirmed, nor has wholly removed, Not having a clear opinion upon the that impression. point, and not thinking it necessary now to decide, nor being sure that it will be necessary to decide, the question. I shall reserve it. I feel confirmed in the opinion, that the paper, whether to be taken as an admission of assets or

not, did not give the plaintiff a right of action; that, unless equivalent to an admission of assets, it did not create a personal demand against the defendants enforceable here; and that it had not the effect of barring or prejudicing the right of the plaintiff's wife in the legacy, or his title in right of his wife, as a legatee.

Holland 6. CLARK

The paper is not a deed, a bill of exchange, or a promissory note. It does not express or shew any consideration, whether of forbearance or otherwise, and is not by the plaintiff suggested to have been given upon any other consideration than the fact, if existing, of the possession or sufficiency of assets. The cases of Deeks v. Strutt (a), and Jones v. Tanner (b), are, I think, also strongly against the legal effect which the paper is contended to have; nor are the decisions in Gregory v. Harman (c), and Hart v. Minors(d), (decisions which I do not question), at variance, as I view them, with any opinion that I have formed in the present cause. They stand on grounds which do not exist here. Upon these points, I have thought it right, besides the authorities that I have mentioned, to look at the cases of The Corporation of Clergymen's Sons v. Swainson (e), Reech v. Kennegal (f), Rogers v. Soutten (g), Bothe v. Crampton (h), Davis v. Reyner, as reported in Levinz (i), Goring v. Goring (j), Rann v. Hughes (k), Childs v. Monins (l), and Bradley v. Heath (m).

With respect to the action between the parties, the plaintiff's bill of particulars in it included, besides certain other items, amounting altogether to 1391. 8s. 9d., the following:—"25th December, 1825. To memorandum of

- (a) 5 T. R. 690.
- (b) 7B.&C.542; 1 M.&R.420.
- (c) 1 M. & P. 209.
- (d) 2 C. & M. 700.
- (e) 1 Vez. sen. 75.
- (f) Id. 123.
- (g) 2 Keen. 598.

- (h) Cro. Jac. 612. •
- (i) 2 Lev. 3.
- (j) Yelv. 10.
- (k) 7 T. R. 350, n.
- (l) 2 Brod. & Bing. 460; 5 B. Moore, 282.
- (m) 3 Sim. 543.

HOLLAND U. CLARK.

debt, £200. Interest to Christmas, 1839, 1901. 0s. 61d. Subsequent interest-" These are debits against the defendant, to whom, however, the bill of particulars allows a credit thus:-"Deduct James and John Clark's account, 1121. 11s. 11d."—John Clark pleaded, that the defendants were never indebted—the Statute of Limitations, and a James Clark separately pleaded pleas of the same nature, and also payment, except as to a sum of £46, which he brought into Court. The plaintiff, in May, 1840, accepted the £46 in satisfaction, as to James Clark, of the causes of action, in respect of which it was paid into Court, and took the money out of Court accordingly; and, in what I believe is the usual form, the action was abandoned against James Clark. No further step appears to have been taken at law. The defendants contend, that, having regard to the bill of particulars, the demand for the legacy and interest must necessarily be considered as satisfied or extinguished by means of these legal proceedings, and the acceptance of the £46. If, indeed, it appeared that the legacy and interest were included in an account, upon the result of which the £46 was the balance due, that might be the consequence. This state of things, however, though possible, is not manifest; and notwithstanding that the difference between 139l. 8s. 9d. and 112l. 11s. 11d. is less than £46, and that there are such items in the bill of particulars as I have mentioned, I cannot conceive that upon any legal or equitable principles there is an estoppel against the plaintiff, so as to bar him, whether in truth the balance of £46 was or was not due, without reference to the demand now in question, or to the paper of 1825; especially, as that paper did not, in my opinion, as I have said, confer any right of action; and as, independently of that paper, an action was not maintainable for the legacy, even had the plaintiff sued at law as his wife's administrator, which he did not do. But there is enough, I think, to render it proper to direct an enquiry, which may produce information as to the account upon which, and the circumstances under which, the sum of £46 arose and was paid and received. Upon this part of the case, I have thought it right to refer to the learned note to Salmon v. Smith (a), mentioned in the argument, and to Robinson's case (b), Seddon v. Tutop (c), Stafford v. Clark (d), Bowden v. Home (e), Eastmure v Laws (f), and Lord Bagot v. Williams (g).

The only remaining question is, whether sect. 42 of the stat. 3 & 4 Will. 4, c. 27, applies against the plaintiff, which turns on the effect to be given to the correspondence of 1839, between John Clark and the plaintiff, and his solicitor, Mr. Wadeson. It is asserted on one hand. and denied on the other, that the letters of John Clark, forming part of this correspondence, are acknowledgments by him within that section. The defendants allege various objections against considering them in this light. It will be sufficient to notice two of these objections. It appears to me, first, that though the case of Whippy v. Hillary (h), and that of Routledge v. Ramsay (i), were decided upon a different statute, expressed in different language, the principle of them applies to this case. John Clark did not write these letters with any view or notion of making or shewing himself liable to any demand of the plaintiff. He refers in them to James Clark, as the person who ought to pay the demand, and expresses his readiness to assist the plaintiff in compelling James Clark to do so. Nor is the answer of John Clark on this point immaterial. The plaintiff has read in evidence from it the following passage:-"That, on or about the 13th day of June—" [His Honour

(a) 1 Wms. Saund. 207.

HOLLAND V. CLARK.

<sup>(</sup>b) 5 Rep. 32 b, last ed., Vol.

<sup>3,</sup> p. 96.

<sup>(</sup>c) 6 T. R. 607.

<sup>(</sup>d) 2 Bing. 377.

<sup>(</sup>e) 7 Bing. 716.

<sup>(</sup>f) 5 Bing. N. C. 444; 7 Scott, 461.

<sup>(</sup>q) 3 Barn. & Cress. 235.

<sup>(</sup>y) 3 Darn. & Cless. 200.

<sup>(</sup>h) 3 B. & Adol. 399; 5 C. & P. 209.

<sup>(</sup>i) 8 Ad. & El. 221; 3 Nev. & P. 319.

HOLLAND v. CLARK.

here read the passage contained between inverted commas, see ante, pp. 154, 155, 156.] I cannot therefore hold these letters to have the effect which the plaintiff wishes to ascribe to them. Again, if these supposed acknowledgments were free from every objection, except as to the person to whom they were given, I should very much doubt their sufficiency. Mr. Holland did not become his wife's administrator until after the date of the last of the letters. suit by him for the legacy commenced after her death had been then brought to a hearing, it would, I conceive, have failed. He might never have become her administrator; nor is it impossible that debts incurred by her, before her marriage, may be unpaid, which her assets in the hands of her administrators may, according to the law admitted in Forbes v. Phipps (a), be liable to discharge. I am not, therefore, prepared to say that he was in July, 1889, a person entitled within the meaning of the 42nd section; the 6th section not, in my opinion, removing the difficulty. On the whole, I must consider the plaintiff precluded in any event from interest beyond six years before the commencement of this suit, and the decree must, in substance be, to-

Refer it to the Master to enquire and state whether the sum of £46 in the pleadings mentioned, or any and what part thereof arose or was due upon an account in which the plaintiff had credit for any and what sum or sums of money in respect of the legacy of £150 in the pleadings mentioned, and interest thereon, or in respect of either of them; and whether the said legacy of £150, or any and what part thereof, and whether the interest, if any, which accrued due thereon, or on any and what part thereof, since the 25th of April, 1834, or any and what part of such interest have or has been ever, and when, and by what means, and in what manner, paid, satisfied, or discharged by set-off or otherwise; and whether anything and what is now due for principal, and whether anything, and what, is due for interest in respect of the said legacy. And in making the said enquiries, the Master is not to consider the proceedings at law in the pleadings mentioned, or the payment and receipt of the

\$\mathcal{2}46\$ in the pleadings mentioned, as matter of estoppel or conclusive evidence. And in enquiring whether anything and what is due for interest, the Master is to consider \$\mathcal{L}4\$ per cent. per annum as the rate of interest, but is not to calculate or allow, and the Court declares the plaintiff not entitled in this suit to recover, interest in respect of any time more than six years before the filing of the bill in this cause. And the Master is to be at liberty to state any circumstances specially. And let the Master have the usual powers. And reserve the question, whether, in the event of anything being found due to the plaintiff, the paper of the 25th of December, 1825, ought to be considered as an admission of assets; and whether there ought to be any account of the personal estate of the testatrix, Sarah Clark; and reserve further directions and costs, with liberty to apply.

HOLLAND 6. CLARE.

## WENTWORH v. TUBB.

THE bill was filed by the plaintiff as administrator and creditor of Charles Henry Tubb, a lunatic, against the heir-at-law of the lunatic, who was also a lunatic, and his committee, praying payment out of a certain real estate which had descended from the deceased to the defendant, the heir-at-law, there being no personal assets.

In the case of necessaries supplied to a lunatic, and his raises a contract by implication on the part of the lunatic, underwhich the heir-at-law, there being no personal assets.

The claim of the plaintiff was founded on a report made by the Master in the lunacy of the deceased, by which, after stating that he had been attended by the solicitors of all parties, he found, amongst other things, that the deceased had been maintained and provided with necessaries, as clothing, washing, &c., at the sole expense of the plaintiff, from 1832 to 1835, when the commission of lunacy issued, and from that period to the death of the lunatic in 1837; and the Master found, upon debiting the plaintiff for several sums received, there was due to him, on account of such maintenance and necessaries, the sum of £360.

The cause now came on for hearing. The plaintiff gave in evidence the proceedings in the lunacy, including the order confirming the Master's report, but he adduced no other evidence. 1841. Dec. 17th,

necessaries supplied to a lunatic, the law raises a contract by implication on the part of the lunatic, under which the amount of ries may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets.

> 5. Bear. 32; 2. 40 E. M.F. 53 9 Bear - 215

WENTWORTH v.
Tubb.

Mr. Parry, and Mr. Russell, for the plaintiff.—It is a general rule of English law, that certain persons, who would otherwise be under a disability to contract, may contract in cases of necessity; and the rule extends to lunatics as well as infants: Manby v. Scott (a). In modern times, courts of law have expressly acted upon this principle: Baxter v. Earl of Portsmouth (b), Browne v. Joddrell (c), Clarke v. Williams (d). Therefore, if courts of law in the case of necessaries supplied to a lunatic, would give relief to the creditor in the lifetime of the lunatic, there is no sound reason why a court of equity should not give relief against his assets after his decease. The case of Carter v. Beard (e) will probably be cited on the other side, but there the necessaries were considered to have been supplied by the bounty of the stepfather.

Mr. Simpkinson, and Mr. Dixon, for the defendant.—
The principle on which the courts of law have proceeded in cases of this nature, is, that a man shall not be allowed to stultify himself by pleading his own lunacy: Stroud v. Marshall (f). That principle does not apply when the lunatic is dead. Besides, in the cases cited, the creditor had no notice of the lunacy. The only express authority in favour of the plaintiff is the dictum of Mr. Justice Bayley in Baxter v. Earl of Portsmouth, but that is opposed to the decision in Carter v. Beard, which was evidently determined on the ground that a lunatic could not legally

<sup>(</sup>a) 1 Sid. 112.

<sup>(</sup>b) 7 D. & R. 614; 5 B. & C. 170.

<sup>(</sup>c) 3 C. & P. 30; Mood. & M. 105.

<sup>(</sup>d) Not yet reported. In Dane v. Lady Kirkwall, 8 C. & P. 679, it was ruled, that, to constitute a defence to an action for use and occupation of a house taken by the defendant under a written

agreement, at a stipulated sum per annum, it was not enough to shew that the defendant was a lunatic, and that the house was unnecessary for her, but that it must be shewn that the plaintiff knew of this, and took advantage of the defendant's situation.

<sup>(</sup>e) 10 Sim. 7.

<sup>(</sup>f) Cro. Eliz. 398.

contract. If it were not so, why was reference made in the judgment to the stat. 8 & 4 Will. 4, c. 104 (a)? This is not a bill to enforce any equitable right acquired in the lunacy, but a bill on behalf of the plaintiff, and all other creditors of the lunatic, to obtain payment of his and their just debts. If such a bill be sustainable, what class of persons will be let in as legal creditors of the lunatic?

WENTWORTH

0.
TUBB.

THE VICE-CHANCELLOR.—The question raised by the plaintiff in this suit is, whether he had a just debt due to him from the deceased lunatic at the time of his death. If I were now satisfied, that there could not have been upon the case stated by the bill, or was not, such a debt, it would be right to dismiss the bill. If I am not satisfied of the non-existence of such a debt, it will be right in one view to make a decree for the plaintiff, and all other creditors; and in another view, to direct an enquiry, whether the plaintiff had any, and if any, what debt due to him from the lunatic at the time of his death. The debt claimed by the bill is for the maintenance of the lunatic during the period when the lunacy subsisted; but not under the authority of any Court or jurisdiction; nor, upon any contract, de facto, with the lunatic, made either before or after the lunacy. The debt, if it is one, became due from the lunatic by operation of law; or, in other words, upon a contract raised by implication of law. If I were satisfied that there could be no such contract—that there could be no liability so raised, it would be my duty to dismiss the bill; but I am not so satisfied. It may be that the plaintiff, at his own expense, supplied the lunatic with necessaries, and supported him decently and fitly with reference to his station in society and the exigencies of his situation, and that the plaintiff did so, not from bounty—not from charity-not without the expectation or intention of being

1841. Wentworth 5. Tubs.

repaid, nor upon the contract or credit of any third person; and supposing the case to be in that position, I am not prepared to say that the law would not raise a contract between the lunatic and the plaintiff, without and independently of any contract de facto. The authorities which have been cited seem in favour of that view. The case of an infant is analogous. The inconvenience which would ensue, if necessaries could not be supplied to a person in this situation, except gratuitously, as far as he and his estate are concerned, would be great. The consequence might be, that, notwithstanding the possession of large estates, such a person might be left to casual charitythrown upon the parish, or exposed to starvation. I am not prepared to say that such is the state of the law, and, as at present advised, I think that it is not so. It is however, possible, that the maintenance in this case may have been afforded from bounty-from charity, and without any notion or expectation of being repaid; and such may have been the circumstances of the suit before The Vice-Chancellor of England-that of Carter v. Beard, where the question arose between the stepfather and the estate of the stepsou. That state of things would create no contract. Again, the lunatic may have been maintained with a view to compensation; but upon the credit of a third person. Then, it would not be the contract of the lunatic; it would be that of the third party. But the argument on the part of the defendant goes to the extent, that the party so contracting would have no remedy against the lunatic or his estate, without a distinct contract by him. If that were so, it would, I think, lead, as I have said, to most mischievous results. The defendant may be able to shew, that there was no debt in this case, but I cannot at present assume it.

The evidence on the part of the plaintiff is not satisfactory; there being no evidence but the proceedings in the lunacy. I am, therefore, not at present certain, taking

the plaintiff's view of the law to be correct, that there is a debt, and I cannot make at present a common creditor's decree, but shall direct an enquiry as to the existence of the debt claimed by the plaintiff.

1841. Wentworth Tues.

ARTHUR HELSHAM and Andrew German, Plaintiffs: and EDWARD LANGLEY and DUNCAN DUNBAR, Defendants.

Nov. 18th.

THE bill in this case stated, that, in April, 1838, the de- On a bill for fendant, Edward Langley, being seised in fee simple of land situate near the East India Road, in the county of Middlesex, was desirous of letting out the same on a building lease; and, in the month of April, he called upon and applied to Mr. John Beasley, who had been previously employed by him as his agent in letting certain houses in Castle Street, Poplar, and in collecting the rents of his houses there, and stated he was the owner of a piece of land in the East India Road, near his said houses, which he was desirous of letting; and Edward Langley and John Beasley thereupon went to view the piece of land; and, after a conversation as to the particulars relating thereto, and the terms of letting the same, Edward Langley desired John Beasley to put up a board on the said ground, which land, with a notice referring to him, and he authorized he had told him and empowered the said John Beasley to let the said piece of land accordingly. That the said John Beasley caused to be set up on the said piece of land a board the agreement with an inscription, stating that the land was to be let, and referring persons desirous of taking the same to John Beasley. That the plaintiff applied to John Beasley, and, build, it was not after some negotiation, he, on behalf of the defendant, Edward Langley, agreed to demise to the plaintiffs, as tenants in common, the premises. That the contract was, on the 16th of April, 1838, reduced into writing, and one a specific percopy of such contract was on that day signed by the plain- refused.

the specific performance of an agreement, by which A., as agent for B., contracted to let to C. a piece of ground for a term of years, at a yearly rent; it appearing from the evidence that B. intended to let the ground for the building of houses of a particular class, and that if he had authorized A. to act as agent in the letting of the was disputed, the purposes for which it was to be let:-Held, that as did not contain any reference to building, nor any covenant to under the circumstances such an agreement as ought to be performed; and a decree for formance was

HELSHAM
v.
LANGLEY.

tiffs; and another copy thereof was on that day signed by John Beasley, who was duly authorized to sign the same on behalf, and as the agent of, the defendant, Edward Langley, and which was in the words and figures, or to the purport and effect following, (that is to say),—

" 16th April, 1838.

"John Beasley, agent for Edward Langley, and on his behalf, doth hereby promise to let to Arthur Helsham, of Whitechapel, and Andrew German, of Mile End, as tenants in common, all that piece of land on the north side of the East India Road, Poplar, in the county of Middlesex, of an angular shape, as bounded by land-marks on the north side, about 200 feet frontage, to hold to the said Andrew German and Arthur Helsham for the term of 31 years, from Midsummer next, at the yearly rent of £15, with a covenant of renewal for the further term of 31 years at the like yearly rent of £15; a lease to be granted to the said Edward Langley on the aforesaid terms and agreements."

That John Beasley immediately wrote and sent to the defendant, Edward Langley, a letter dated the 17th April, 1838, communicating to him the fact of his having entered into the said agreement with the plaintiffs; but that the defendant, disregarding the agreement, and without any communication whatever with the plaintiffs or the said John Beasley on the subject, wrongfully entered into an agreement with the defendant, Duncan Dunbar, for a like lease to him of the same piece of land, by an agreement dated the 28th April, 1838.

The bill alleged various acts, to shew that Beasley was the recognised agent of the defendant Langley, and that the defendant, Duncan Dunbar, knew of the agreement entered into by Beasley with the plaintiffs.

The bill prayed a specific performance of the contract, and that the defendant, Edward Langley, might be decreed to execute a lease according to the terms of it. The bill also prayed for an injunction to restrain Langley from entering into any agreement to let or sell the premises, except subject to the agreement with the plaintiffs, and from executing any demise or conveyance of the same; and to restrain the defendant, Dunbar, from accepting any lease, demise, or conveyance of the premises. HELSHAM

U.

LANGLEY.

The defendant, Langley, by his answer, denied the authority of Beasley to enter, as agent for him, into the agreement with the plaintiffs.

The defendant, Dunbar, by his answer, relied on the agreement entered into by him with the defendant, Langley.

The plaintiffs examined, among other witnesses, John Beasley, who proved that he had been employed as agent by Langley to collect his rents, and let houses belonging to him, for six months prior to March, 1838. That, in March, 1838, he accompanied the defendant, Langley, at his request, to look at the piece of ground in question, and that, on that occasion, the defendant, Langley, inquired what rent the witness thought the ground was worth; on which the witness asked what term the defendant proposed to grant, and, on being told thirty-one years, the witness observed, that such term would be too short to induce persons to build a good class of houses, and inquired whether the defendant would be disposed to insert a covenant for renewal, at the expiration of the thirty-one years; to which the defendant replied, that he would let the witness know more about that another time, but that he most probably would not object to renew. This witness then proved, that the defendant, Langley, gave him directions to have a pole with a board erected on the piece of ground, announcing it to be let, and referring to the witness for particulars; and desired the witness to let it for him as soon as he could, and to let it for £16 a year, if he could get it. This witness further stated, that a few days afterwards the defendant, Edward LangHELSHAM v. LANGLEY. ley, called on him, and inquired if he had let the ground; and that, on the witness telling him that he had not, but that two persons had made inquiry about it, the defendant desired the witness to let the land as soon as he could, and if he could not get £16 to take less, and to let it on the best terms he could make. The witness then deposed, that, in pursuance of the authority which was given to him by the defendant, Langley, he entered into the agreement with the plaintiffs. That the agreement was drawn up by the plaintiff, Andrew German, and, as the witness could not write, it was signed for him by his daughter, Angelina Beasley, who frequently assisted him in his business, and particularly in any writing he had occasion for.

The daughter of the last witness corroborated to some extent the evidence of her father. She also proved the agreement of the 16th April, 1838, and stated that the name of her father was not actually written by him, but was written by her, whilst he had hold of the top of the pen.

There was some evidence also on the part of the plaintiffs to shew that the defendant, Langley, had at times expressed his desire to perform the agreement with the plaintiffs, but that he had been persuaded by his friends to enter into the agreement with the defendant Dunbar.

Mr. Swanston, and Mr. Anderdon, for the plaintiffs, contended, that the evidence distinctly proved that Beasley was authorized, as the agent of Langley, to enter into the agreement with the plaintiffs, and that Dunbar was aware of the agreement with the plaintiffs prior to the time when the agreement between Langley and himself was entered into.

Mr. Tead, and Mr. Dickinson, for the defendant, Langley.

Mr. Walker, for the defendant, Dunbar.

THE VICE-CHANCELOR, without hearing the counsel for the defendants.—Supposing the authority to Beasley to enter into the agreement with the plaintiffs to be clearly proved, it does not follow that it is such an agreement as a court of equity will decree to be specifically performed. The agreement appears to have been signed by an illiterate person, as agent for the defendant, Langley, and to have been drawn by one of the plaintiffs. In the very first conversation which takes place between the principal and the agent on the subject of the letting of the ground, the agent states to the principal that if so short a term as thirty-one years, the time for which the principal proposed to let the ground, was only granted, houses of a good class could not be built. It is clear from the evidence of Beasley the agent, and, indeed, from all the other evidence, that the ground was intended for building on. Notwithstanding this, the agreement does not contain a single stipulation with regard to building, nor any covenant to build; nor, in fact, any other covenant whatever. It is unnecessary therefore to decide the question of authority or no authority. It is clear, that if the authority were ever so well established, yet, according to the decisions of this Court, a decree ought not to be made for a specific performance. The defendant, Langley, appears to have brought this suit on himself by his conduct; he cannot, therefore. have any costs. The defendant, Dunbar, will have his costs.

HELSHAM V.

The bill was dismissed without costs, as to the defendant, Langley, but with costs to the defendant, Dunbar.

1841.

Dec. 2nd.

To obtain a writ of sequestration under the 9th of the Orders of August, 1841, the affidavit must state that the person su-ing forth the writ of attachment verily believed that the defendant was in the county, not resident in the county into which the writ was issued.

STORER v. GREAT WESTERN RAILWAY COMPANY.

MR. BAZALGETTE moved, under the 9th of the Orders of August, 1841, for a writ of sequestration against two defendants of the names of Gibbs and Gore; the sheriff having returned non est inventus as to each of the defendants to an attachment against them for not answering the bill. In the affidavit on which this motion was made, it was stated, that, at the time of ordering the attachment, the deponent verily believed that the defendants were residing in Middlesex.

THE VICE-CHANCELLOR was of opinion that the affidavit was insufficient, the language of the 9th Order being "in the county," and not "resident in the county."

Motion refused.

Dec. 9th .

On return non
est inventus to
a writ of attachment, the Court
will order a serjeant-at-arms.

Mr. Bazalgette, having failed in his former motion, this day moved for a serjeant-at-arms.

Ordered.

1842.

Jan. 15th.

To support a motion under the 24th of the Orders of August, 1841, for leave to enter a memorandum of service of a copy of the bill, it is necessary to shew the nature of the suit, and the mode of service.

HAIGH v. DIXON.

MR. COLLYER, for the plaintiff, moved, under the 24th of the Orders of August, 1841, for leave to enter a memorandum of service of a copy of the bill on one of the defendants, pursuant to the 23rd of the same orders. The affidavit stated that the deponent had served the defendant with a copy of the bill, omitting to state that he had personally served him.

THE VICE-CHANCELLOB.—To support a motion of this nature, it is necessary to shew at least two things—the nature of the suit, and the mode of service.

Motion postponed.

Jun. 362.

1. Have. 317.

1842.

GOODWIN v. BELL.

March 3rd.

UPON a motion made by Mr. Lovat similar to that in To support a the foregoing case, The Vice-Chancellor held, as he has held in other cases, that some evidence should be given that the defendant, on whom the copy of the bill was served, was not an infant; but that an affidavit as to information and belief on that subject was sufficient.

motion under the 24th of the Orders of August, 1841. some evidence should be given that the party served with a copy of the bill was not an infant.

## LLOYD v. LLOYD.

Jan. 21st.

THE bill was filed by creditors for the administration of In a suit for the estate of a testator, who by his will, after charging his the real estate real estates with certain annuities, and subject thereto devising the same in strict settlement, gave power to his trustees to sell such real estates, and apply the proceeds of power of sale the sale in satisfying such part of his debts as his personal estate might be insufficient to pay.

The trustees having only a power to sell, and not an estate in the lands, the annuitants and other persons interested in the real estate had been made parties to the suit (a), and they had been served with copies of the bill instead of writs of subpæna, pursuant to the 23rd of the the Orders of Orders of August, 1841.

administering of a testator, the devisees of the real estate. subject to a given to trus-tees by the will for the purpose of paying debts, are persons against whom " no direct relief" is prayed, within the meaning of the 23rd of August, 1841.

Mr. Amphlett now moved, under the 24th of those Orders, for leave to enter a memorandum of service of such copies. He observed that these were parties against whom "no direct relief" was sought by the bill, inasmuch as the power of sale was paramount to their estate; and that the only reason for making them parties was, that

LLOYD 5. LLOYD. they might have an opportunity of seeing that the personal assets were properly administered—an object which could be attained as well by service of a copy of the bill as by a subpoena.

THE VICE-CHANCELLOR.—There will be great difficulty, in some cases, in saying to what parties the 23rd Order applies. The present case, however, seems to come within it, and I will therefore make the order.

The evidence consisted of an affidavit by the town solicitor, that he had, on a certain day, sent by post to the solicitor in the country three true copies of the bill, with directions to have them served upon the defendants, who all lived in North Wales; and an affidavit by the clerk of the country solicitor, to prove that the same were received by post on the following day, and were personally served on the defendants.

The Registrar objected, that the copies served ought to have been office copies, and that it had been so decided by the Master of the Rolls. But *The Vice-Chancellor* said, that it was not so required by the Orders, and that the above affidavits appeared to him to be sufficient.

1842. Jan. 18th, 26th.

## BURRIDGE v. Row.

By an indenture of settlement, bearing date the 16th Byasettlement, November, 1825, and made between Alderman Winchester and Sarah his daughter, of the first part. William Row. the younger, of the second part, and Skinner Row and trusts were de-Thomas Briggs, of the third part, reciting that a marriage was intended to be had between the said William Row and Sarah Winchester, and that, on the treaty for the same, Alderman Winchester had agreed to execute, and had since executed, to the said Skinner Row and Thomas Briggs, a bond for securing to them, in case the marriage should take effect, payment of the sum of £5000 within six calendar months next after his Alderman Winchester's decease, with interest from the time of the marriage; and reciting that William Row had agreed, in case the marriage should take effect, to secure to the said Skinner Row and ment of the lat-Thomas Briggs, their executors, administrators or assigns, payment of a sum of £5000 within six calendar months next after the decease of him the said William Row, and to assign the several policies of insurance thereinafter men- on his own life,

executed upon the marriage of A. with B., the daughter of W., clared of two several sums of £5000, whereof one was secured by the bond of W., and the other by the covenant of A., and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payter sum, A. assigned to the trustees certain policies of assurance, which he had effected to the value of the principal

money comprised in his covenant. The trusts declared of the former sum were for B. for life, for her separate use, and after her death for A. for life, and after the death of both, and in default of children of the marriage, for the benefit of B.'s estate. The trusts of the latter sum were for B. for life, and after her death, failing children of the marriage, for the executors, administrators, and sasigns of A. After the marriage A. became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividend received under that proof in the purchase of £431 consols. At the same time W. purchased of A.'s assignees all A.'s interest in the settlement, and took from them an assignment of that interest. A. afterwards died: whereupon the trustees received the produce of the policies, and invested it in £5992 Consols. Ultimately, W. became bankrupt, and died:—Held, that, notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and assignment from A.'s assignces, the assignces of W. could take no interest in the £5992 stock, without first satisfying the trustees of the settlement what was due to them in respect of W.'s bond for £5000. And guære, whether, notwithstanding the assignment to W. of A.'s interest under the settlement, A.'s assignces had not a right to recall the dividend which produced the £431 Consols?

Feme covert, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as a collateral security for a provision settled upon her under that instrument by the covenant of her husband:— Held, that, upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid.

The voluntary payment of premiums on a policy of assurance confers on the payer no in-

terest in the policy.

4ª f. L.l. Much 13. 144 su 3 Jan . 299

BURRIDGE v. Row.

tioned, and the monies thereby secured, or to accrue thereon, upon the trusts thereinafter expressed: it was witnessed and declared, that, in case the said sum of £5000, so secured by the said bond of the said Alderman Winchester, should become payable, then the said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, should lay out and invest the same in their or his names or name, in or upon real or Government securities, and stand possessed thereof, and of the interest in the mean time growing due thereon, upon trust, after the solemnization of the said intended marriage, to permit, authorize, and empower the said Sarah Winchester, and her assigns, during her life, to receive and take the yearly dividends, interest, and annual proceeds thereof, to and for her and their own use, and not subject to the control, debts, or engagements of the said William Row; and after her decease, upon trust, to permit and authorize the said William Row, and his assigns, to receive the dividends and interest of the said fund during his life; and after the decease of the survivor of them, the said Sarah Winchester and William Row, upon certain trusts, for the benefit of the children (if any) of the marriage, and in default of children for the executors or next of kin (according to circumstances) of Sarah Winchester. And by the same indenture, William Row, for himself, his heirs, executors, and administrators, covenanted with the said trustees, their heirs, executors, and administrators, that, in case the said intended marriage should take effect. his heirs, executors, or administrators, would, within the space of six calendar months after his decease, pay or cause to be paid to the said trustees, or the survivor of them, or the executors or administrators of such survivor, the sum of £5000 sterling, upon the trusts thereinafter expressed and declared concerning the same; and after reciting that William Row had effected two policies of assurance on his life for £3000 and £2000, and describing those policies; and reciting that it had been agreed, that those policies, and all bonuses and accumulations thereon, should be assigned to the said trustees as a fund or security in aid of the covenant thereinbefore contained for payment of the said sum of £5000 thereby covenanted to be paid, and all and every other sum or sums which they the said trustees, or the survivor of them, might pay to keep the same policies on foot, as thereinafter mentioned: it was thereby further witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said William Row did bargain, sell, assign, transfer, and set over unto the said trustees, their executors, and administrators, the said two several instruments or policies of insurance thereinbefore mentioned, and the said two sums of £3000 and £2000 thereby secured, and all bonuses or accumulations in respect thereof, to have, hold, receive, take, and enjoy the same, unto the said trustees, their executors and administrators, in trust. in case the said intended marriage should take effect, as soon as conveniently could be after the decease of the said William Row, to call in and receive the said several sums of £3000 and £2000, and every other sum of money payable by virtue of the same policies of insurance, and out of the monies so to be received, to pay, satisfy, and retain the said sum of £5000 thereinbefore covenanted to be paid by the said William Row, or so much thereof as should not have been previously paid by his heirs, executors, or administrators, pursuant to the same covenant; and also should invest the said sum of £5000, and such further or other sums, in the names of the trustees in the parliamentary stocks or public funds, or at interest upon Government or real securities, and stand possessed of and interested therein upon the following trusts, that is to say, upon trust to permit or authorize and empower the said Sarah Winchester, and her assigns, during her life, to receive and take the interest, dividends, and annual produce of the said sum of £5000, and all and every other

BURRIDGE V. Row. BURRIDGE v. Row. sum or sums that should or might be received under or by virtue of the said two policies of insurance, and of the stocks, funds, or securities, in or upon which the same should be invested, in the same manner as was thereinbefore declared respecting the dividends and annual produce of the said sum of £5000 secured to be payable on the decease of the said Alderman Winchester; and after the decease of the said Sarah Winchester, upon certain trusts for the benefit of the children of the marriage; and in default of children, in trust for the said W. Row, his executors, administrators, and assigns.

The settlement contained a covenant on the part of Bow to keep the policies on foot; and it was provided, that in case Row should at any time thereafter neglect or refuse to pay the annual premiums, it should be lawful for, but not compulsory upon the trustees, at the request in writing of Row and his wife, to pay the annual premiums out of the interest of the £5000, payable on the decease of Alderman Winchester, or to mortgage, charge, or sell the policies, and stand possessed of the produce upon the same trusts as were declared of the £5000 thereby secured.

The marriage took effect soon after the date of the settlement.

On the 9th of October, 1828, a commission of bankrupt issued against W. Row, when, in pursuance of an order obtained on the petition of the trustees, the covenant of Row to pay the £5000 was valued at £1625, and the trustees proved for the same accordingly. Dividends were afterwards received on this proof, which were invested in the purchase of 431%. 19s. 9d. Consols, in the names of the trustees.

Row paid the premiums due on the policies of assurance until his bankruptcy. For some years after that period they were paid by Alderman Winchester, who retained the amount out of the interest payable from him to his daughter on the £5000 bond, and ultimately they were paid by the daughter herself.

By an indenture of assignment, bearing date the 5th January, 1832, and made between the assignees of Row, of the one part, and Alderman Winchester, of the other part. reciting the before-mentioned facts, and that Alderman Winchester had contracted with the said assignees for the absolute sale to him of all the said bankrupt's interest, reversion, and expectancy of and in the said sums of £5000 and £5000 under and by virtue of the said indenture of settlement, and all benefit and advantage thereof, at the price of £100: it was witnessed, that in pursuance of the said agreement, and in consideration of the sum of £100 &c., the said assignees bargained, sold, assigned, transferred, and set over, to the said Alderman Winchester, his executors, administrators, and assigns, all the reversion, interest, and expectancy of the said bankrupt of and in the interest of the first mentioned sum of £5000, so secured by the bond of the said Henry Winchester, as therein was mentioned, and which the said William Row would have been entitled to receive during his natural life, in the event of his surviving Sarah his wife; and also of and in the said secondly mentioned sum of £5000 so secured to be paid to the trustees under the said therein recited indenture by the heirs, executors, and administrators of the said bankrupt within six calendar months next after his decease, by virtue of the said settlement, and which had been so valued, and on which the said dividend had been so received and invested as therein mentioned; and all his right, title, and interest of and to the same, and every part thereof, and all accumulations thereon; to have, hold, receive, and take the said reversion, interest, and expectancy of and in the said several sums of money and premises thereinbefore assigned or intended so to be, unto the said Winchester, his executors, administrators, and assigns, to and for his and their own use and benefit, and as and for his and their own proper monies and effects, in as full, ample, and beneficial a manner as he the said WilBURRIDGE v. Row. BURRIDGE 8. Row. liam Row, his executors, administrators, or assigns, by virtue of the said indenture of settlement, might have held the same in case he had not become a bankrupt.

Shortly after the execution of this assignment, namely, in March, 1832, William Row died, leaving no issue. His widow in the following month married John Burridge, and soon afterwards went with her husband to the East Indies. No settlement was made upon this marriage.

Upon the death of William Row, the trustees, Skinner Row and Thomas Briggs, received the two sums of £3000 and £2000 secured by the policies of assurance, and also a further sum of £279 as a bonus thereon, and they, with the privity of Alderman Winchester, invested these sums in the purchase of a sum of 59921. 17s. 4d., £3 per cent. Consolidated Bank Annuities, in their the trustees' joint names.

The dividends on this last-mentioned stock, and also on the 4311. 19s. 9d. Consols, were regularly paid by Briggs, the acting trustee under Row's marriage settlement, to Mr. and Mrs. Burridge until the year 1835, from which time the dividends were allowed to accumulate.

On the 17th February, 1838, a fiat in bankruptcy issued against Alderman Winchester, under which he was declared a bankrupt. In the following month Alderman Winchester died; and in July Mr. and Mrs. Burridge returned from India and claimed to have a transfer to them of the 5992l. 17s. 4d. stock, and the payment of the dividends remaining in the hands of Briggs. This was refused on the ground that Briggs, who was solicitor under the fiat against Winchester, and also Winchester's private solicitor, had received notice from Winchester's assignees not to make such transfer or payment.

The present bill was filed by Mr. and Mrs. Burridge against the trustees of Row's marriage settlement and the assignees of Winchester, charging that the assignees claimed the produce of the policies on the ground that Row's

covenant for payment of £5000 had been satisfied by the proof made by the trustees against Row's estate under his bankruptcy, and praying a declaration that the plaintiffs were entitled either to an absolute interest, or an interest for the life of John Burridge, in the sum of 431l. 19s. 9d. Consols, and also in the sum of 5992l. 17s. 4d. Consols, the produce of the policies, and might be paid the dividends on the latter sum due since 1835, and might be repaid the amount of premiums paid by Mrs. Burridge on the policy from the time of Row's bankruptcy until her death.

BURRIDGE 8. Row.

The hearing of the cause having commenced, The Vice-Chancellor observed, that Row's assignees were not before the Court; and, although they had executed an assignment to Winchester of the bankrupt's interest in the trust funds, that might not include every interest which they as assignees might have in the questions before the Court. No further observation, however, was made on that subject in the course of this day's argument.

Mr. Simpkinson, Mr. Russell, and Mr. Wetherell, for the plaintiffs.—First, the sum of 431l. 19s. 9d. represents the corpus of the £5000 which Row covenanted to pay. The plaintiffs, therefore, are entitled to the dividends of that sum for the life of Mrs. Burridge.

Secondly, the plaintiffs have a right to have the sum of 5992l. 17s. 4d. Consols applied by the trustees in satisfaction of the bond of Alderman Winchester. It is alleged, on the other side, that Row's covenant being satisfied by payment of the 431l. 19s. 9d., the plaintiffs have no further claim on the policy fund; and, therefore, that the whole of that fund belongs to the parties who represent Row's interest, that is to say, the assignees of Winchester. But how can Winchester's assignees call on the trustees of this fund to pay it over to them, without first satisfying the trustees the amount of Winchester's bond? It is true

BURRIDGE 8. Row. that Winchester acquired his interest in the policy fund by an act subsequent to the settlement, and not under the settlement itself; but the principles of Priddy v. Rose (a), Woodyatt v. Gresley (b), and Smith v. Smith (c), will nevertheless govern this case. It is a case of mutual credit: Jeffs v. Wood(d), Ranking v. Barnard(e), Corsbie v. Free(f), Besides, the policies are not made mere securities, but are the subject of the settlement. We say we are entitled to interest on the policy fund: but, whether we are or not, we are entitled to have the produce applied in satisfaction of the bond and interest, and of the sums which we have paid for premiums. The personal covenant of the husband was only a collateral guarantee that the sum should at least be £5000. [The Vice-Chancellor.—In Smith v. Smith it was held, that the trustees might retain the dividends to make good the debt. That is different from selling the whole interest.] The circumstance of the interest being reversionary ought not to make a difference.

Mr. Rogers, Mr. Briggs, and Mr. Bourdillon, for the trustees.

Mr. Cooper, and Mr. Walford, for the assignees of Winchester.—When the policies were assigned to the trustees, no notice was given at the offices, and, therefore, on the bankruptcy of Row, the policies were in his order and disposition. [The Vice-Chancellor.—You do not make that case by your answer. Besides, is it certain that that doctrine applies to the case of policy holders who are partners with the assurers (g)?] At all events, on the proof being made under Row's bankruptcy, the policy fund was withdrawn from the settlement, and became vested in

<sup>(</sup>a) 3 Mer. 86.

<sup>(</sup>b) 8 Sim. 180,

<sup>(</sup>c) 1 Y. & C. 338.

<sup>(</sup>d) 2 P. W. 128.

<sup>(</sup>e) 5 Madd. 32,

<sup>(</sup>f) Craig & Ph. 64.

<sup>(</sup>g) See Falkener v. Case, 1 Bro.

C. C. 125; Williams v. Thorp, 2 Sim. 257; Ex parte Colvill, Mont.

<sup>110.</sup> 

Row's assignees, and afterwards in Winchester. But to what extent was that fund ever subject to the trusts of the settlement? Only so far as it was properly dealt with by the trustees. No dealing with the premiums by Alderman Winchester or his daughter would subject that fund to the trusts. The trustees, in certain events, had a right to pay the premiums or sell the policies; but here no authority for that purpose was ever given, pursuant to the terms of the settlement. Suppose, then, the policies, under such circumstances, had been sold to a stranger, could it have been contended that they were liable to the trusts of the settlement? If not, the accidental circumstance of their being sold to Alderman Winchester can make no difference. In the cases which have been cited, the claims which were set off against each other arose out of the same settlement, which is not the case here. The mere circumstance, it is submitted, of Winchester's paying the premiums would entitle him to the fund. Upon the bankruptcy of Row, there were no funds to keep up the premiums, and the trusts were at an end. Subject to any arrangement between himself and his daughter, it was a clear and distinct purchase by Alderman Winchester.

THE VICE-CHANCELLOR.—From whatever motive Alderman Winchester paid these premiums, if they were not paid by means of any contract with the trustees or with Mr. Burridge or his wife, the consequence of those payments would not be the acquisition of the property in the policies by Alderman Winchester. Nothing that has been stated to me has had the effect of persuading me that, without any contract for that purpose, the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property. I am not aware that there is any authority or principle in

BURRIDGE BURRIDGE BOW. BURRIDGE 5. Row. support of any such proposition. I must, therefore, hold, that Mrs. Burridge's life interest in the policy fund exists in her, not affected in any way by what has been done, except to this extent,—that if there be any dispute whether or not Alderman Winchester was repaid the amount of the premiums by means of the detention of the income which he was liable to pay to Mrs. Burridge, there must be an inquiry on that point. [It was here stated at the bar that he was repaid.] Then that fact must appear on the decree.

It then remains to consider the title of Mrs. Burridge to compensation, or indemnity, in respect of the payments which she has made, and which her husband's estate was liable to make. It is, as I understand, proved in the cause, that Mrs. Burridge, out of her income, or by means of deductions out of her income, has actually paid the premiums, to a certain extent, on the policies which his estate was liable to pay. I must, therefore, declare, that the plaintiff, Mr. Burridge, in right of his wife, has, in respect of the sums charged against her for these premiums, a lien upon Row's interest under the settlement, whether it has been assigned or not to Alderman Winchester. Whether those sums would carry interest may be a question. If I were to decide the question now, I should decide that these premiums bear simple interest at £4 per cent. [The defendants' counsel said they would not press this point].

Then there is another question, (treating it as unaffected by any thing which has taken place in Winchester's bank-ruptcy), namely, the question of set-off. Having regard to the rights and liabilities of the parties immediately before the bankruptcy of Winchester, I think there is a right on the part of the plaintiffs to say, that the interest belonging to Row's estate, which Mr. Winchester had purchased, shall not be taken from them without making good Winchester's obligations; although the liability does not stand

exactly on the same footing as in the three cases of Priddy v. Rose, Woodyatt v. Gresley, and Smith v. Smith. I view the policy fund as standing rightly in the names of the trustees now before the Court. If Winchester had not become bankrupt, and after his death his executors had applied to the trustees for a transfer of the policy fund and interest on the policies, the trustees would have had a right to say.— "True, we owe you this, but you owe us a sum on your bond; therefore, let an account be stated between us." If that were the state of the rights of the parties at that time, the bankruptcy of Winchester would make no difference: but, according to the extensive meaning which has been applied by the authorities to that expression, there was a mutual credit between the parties. There was a right of retainer, set-off, or lien,—call it what you will,—in favour of the plaintiffs against Winchester's estate. I am not, however, prepared to say that I can give effect to that lien now; but it may be convenient that I should declare it, for then the effect of it may be obtained in Mrs. Burridge's lifetime; inasmuch as the assignees of Mr. Winchester may think fit to sell the reversionary interest in the policies; and if they take that course, they must do so subject to that right which I think I am justified in now declaring to be in the plaintiffs.

BURRIDGE b. Row.

On a subsequent day, on the cause being again mentioned, The Vice-Chancellor repeated the doubt which he had before expressed, as to the effect of the deed of assignment on the rights of Row's assignees; his Honour being of opinion that it was a question whether, notwithstanding that instrument, those assignees might not have a right to call back the £431 stock: and he desired that the point should be argned on a future day.

The question was accordingly argued; and, in the course of the argument, the cases of Ex parte Downes (a),

(a) 18 Ves. 290.

BURRIDGE 8. Row. Ex parte Eggington (a), and Ex parte Solomon (b), were cited.

THE VICE-CHANCELLOR.—I continue of opinion, that the question, what ought to be done with the fund consisting of 4311. 19s. 9d. Consols is a question of considerable difficulty, under the peculiar circumstances of That difficulty is, however, more with respect to the title of the assignees of Row, than with respect to that of the assignees of Winchester. It occurred to me at one time, in the course of the argument, not, certainly, to give the fund to the assignees of Winchester, but so far to deal with it as liable to an adverse outstanding claim, as now to dispose of it, without prejudice to any claim to be made upon it in favour of the real objects of the trust; leaving those absent parties to apply, if they might be so advised. Having, however, frequently reconsidered this subject since the day on which it was last before the Court, I have come to the conclusion, that the more safe course will be to keep back that fund for the present, and to give the assignees of Row liberty to apply if they think fit. As I understand it, the fund representing the dividends has been accumulating since it was brought into Court: and. of course, that amount of stock has been varying every half year, and the two sums have been kept distinct. think, therefore, that I shall better consult what is due to substantial justice, by not letting Mrs. Burridge, as I was originally disposed to do, receive the income of this fund, but by retaining it, and carrying it over to a separate account; the accumulations to be continued and carried over, without prejudice to any question, with liberty to the assignees of Row, or any other person, to apply respecting that fund as they may be advised.

If the assignees of Row think fit to come to this Court

<sup>(</sup>a) Mont. 72.

in this cause upon a petition, either as respondents or as petitioners, I shall be ready to hear and dispose of that case. I neither encourage nor discourage any such claim. I only see enough to convince me, that there is reasonable subject for discussion, and that that discussion may involve their interests. Should they think fit to discuss the question in this or in any other suit, there will be two points to consider—first, whether either they or the assignees of Winchester are entitled to any thing—whether either of them can displace Mrs. Burridge's title; and if either of them can displace Mrs. Burridge's title, then, whether, according to the true construction of that deed, they, or the assignees of Winchester, are entitled; a question into which I cannot effectually enter, in the absence of the assignees of Row.

BURRIDGE 6. Row.

The reason of the doubt in this case is obvious, namely, that whereas, according to the intention of the settlement, if the policies produce the full sum of £5000, there can be no claim against the estate of Row, yet, in fact, there has been a claim against the estate of Row, without any deduction or variation in respect of these policies, and these policies have since produced the full amount. That is the difficulty I have felt from the beginning of this case, and from which my mind is not yet relieved; and, therefore, I think I shall be much more likely to do justice to all parties by reserving that fund for the present.

Declare that the plaintiffs, in right of the plaintiff Sarah Burridge, are entitled during her life to the interest and dividends on the sum of 59921. 17s. 4d. Bank Annuities in the pleadings mentioned, and to the dividends which have accrued due on such sum up to the present time, but subject to the payment of the costs of the defendants, the trustees, as after mentioned. And it appearing and being admitted that Henry Winchester did during his life, and after the bankruptcy of William Row, pay four several sums of 1191. 18s. 8d. each, as and for premiums on the two policies in the pleadings mentioned, which said several sums were properly due from and payable by the said William Row, or by his estate; and it being admitted that the said Henry Winchester has been fully repaid the

BURRIDGE v. Row. said four several sums of 1191. 18s. 8d. each by the plaintiff, Sarah Burridge, and that his estate has not any claim or interest therein, which has not been paid and satisfied by the said Sarah Burridge; declare that in respect of and in satisfaction for each said four sums of 1191. 18s. 8d. each, together with interest thereon respectively after the rate of £4 per cent, per annum, from the respective times of the payment of such said four sums by Henry Winchester, in the events that have happened, the plaintiffs, in right of Sarah Burridge, have a lien upon the capital of the aforesaid sum of 5992l. 17s. 4d., £3 per cent. Bank Annuities, in reversion immediately expectant on the said life interest of Sarah Burridge. And subject to such life interest, and subject also to the payment of the said four several sums of 1191. 18s. 8d., and interest thereon as aforesaid, declare the defendants Skinner Row and Thomas Briggs, as trustees of the settlement of 16th November, 1825, in the pleadings mentioned, are entitled as against the defendants (the assignees of Winchester) to hold and retain the said sum of 5992l. 17s. 4d., £3 per cent. Bank Annuities, until the sum of £5000 in the pleadings mentioned, secured by the bond of Henry Winchester to Skinner Row and Thomas Briggs, together with interest thereon at the rate of £5 per cent. per annum, secured by such bond, so far as such interest is now and shall hereafter accrue due, shall be paid and satisfied; and that the said defendants, the assignees, without making good such said sum of £5000, and interest thereon, are not entitled to claim the said bank annuities, or any part thereof, or the dividends thereof. And let part of the said sum of 5992l. 17s. 4d., £3 per cent. Bank Annuities, sufficient to pay the costs of the defendants Row and Briggs as between solicitor and client up to the present time, be sold, and let such costs be taxed if the parties differ, and be paid accordingly. And let the dividends due on such bank annuities, and to accrue due on the residue thereof during the joint lives of the plaintiffs, or until further order, be paid to the plaintiff John Burridge. Declare that the plaintiffs, in right of the plaintiff Sarah Burridge, are absolutely entitled to the benefit of the said bond. Let no costs to this time be paid to the plaintiffs or the assignees. Liberty to apply. Reserve subsequent costs; and the decree to be without prejudice to such claim, if any, as the assignees under the bankruptcy of William Row, the younger, may have upon the said sum of 4311. 19s. 9d. Consols. Let that sum be without prejudice carried to a separate account, to be called the dividend account, to accumulate until further order. Liberty to the assignees of William Row, and to the parties to the cause, to apply in this suit respecting that fund, as they may be advised; and by consent of the trustees, let them within a fortnight give notice of this decree to the assignees of William Row.

1841.

Dec. 17th.

## KELLY v. HOOPER.

BENJAMIN CRITCHETT, who was inspector of letter carriers in the General Post Office in London, published an annual work called "The Post Office London Directory," containing exclusive information as to the regulations of the Post Office concerning the transmission of letters. In September, 1836, Critchett died, and the plaintiff, succeeding to his office, purchased the copyright of the work from Critchett's administratrix, and continued to an answer from the defendant, for the purpose of having his title

In 1839 the defendant Hooper pirated the work, by copying the most important parts of it into a sixpenny publication called "The Post Office Almanack." The plaintiff then filed his bill, and obtained an ex parte order for an injunction on the 11th December, 1839. On the 27th of the same month, the defendant moved to dissolve the injunction, but The Vice-Chancellor of England ordered that it should be continued, and that the plaintiff, whose title was disputed by the defendant, should bring such action as he might be advised.

In February, 1840, the declaration in the action being the costs of the ready for delivery, the plaintiff's solicitor wrote a letter to the defendant's solicitor, in which he took notice, that the defendant's time for answering would expire on the following saturday, and requested to know whether it was the defendant's wish that proceedings should go on, or whether the was willing to stop the proceedings, and pay "the costs to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and the pay those costs, of the suit, and if by the refusal of the defendant to pay those costs of the suit, and the answer, as between party and to pay those costs, of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and the pay the costs of the suit, and the proceedings are the costs of the suit, as between party and the proceedings are the costs of the suit, as between party and the proceedings are the costs of the suit, as between party and the proceedings are the costs of the suit, as between party and the proceedings are the costs of the suit, as between party and the proceedings are the costs of the suit.

strain the piracy of a literary work, a plaintiff, who in opposifendant's denial of his title, obtains an injunction, is entitled to an answer from the depurpose of having his title admitted, (in case, by arrangement between the parties, the title is not established at law); and also, of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff, there-fore, under such circumstances, is entitled to suit, including the answer, as between party and party; and if by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of tween party and party, although at the hearing

he may waive the account. And the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer, with a view to obtain terms more beneficial to himself than the Court would, under any circumstances, accord to him; as, for instance, with a view to receive costs as between solicitor and client.

KELLY v. HOOPER.

the defendant his bill of costs, made out as between solicitor and client. These costs the defendant refused to pay, but offered to pay taxed costs, as between party and party. The plaintiff, however, insisted that his proposal as to costs should be acceded to, or that the defendant should put in his answer. The defendant then sent to the plaintiff an account of the sales of the spurious work, by which it appeared that he had incurred a loss; offering at the same time to verify the account by affidavit. To this communication the plaintiff made no reply, and ultimately the defendant put in his answer, admitting the plaintiff's title. The plaintiff then offered to put an end to further proceedings upon receiving costs as between party and party, including the costs of the answer. The defendant, however, rejected this offer.

The cause now coming on for hearing,

Mr. Cooper, and Mr. Tripp, for the plaintiff, waived the account, but contended that the plaintiff had a right, under the circumstances, to have an answer from the defendant, admitting or denying his title, and therefore that he was entitled to the costs of the suit.

Mr. Simpkinson, and Mr. Bichner, contrà, contended that the defendant had been compelled to continue the suit by an unjustifiable attempt on the part of the plaintiff to obtain unusual costs; that the defendant, therefore, ought not to pay the costs of the answer or subsequent proceedings. Whittingham v. Wooler (a), Millington v. Fox (b).

THE VICE-CHANCELLOR (c).—It must assuredly be inferred from the course of proceedings in this case, that the action was brought at the instance and through the conduct of the defendant. Afterwards, indeed, he expressed a desire that the action should be discontinued,

<sup>(</sup>a) 2 Swanst. 428. (b) 3 Myl. & Cr. 33 (c) Ex relatione.

and he appeared to be willing to submit to the plaintiff's title, and a negotiation took place between the parties, before the answer was put in. But there was clearly at that time no formal recognition, or judicial determination of the title of the plaintiff; and in the earlier stage of the proceedings the defendant had actually disputed that titlea circumstance which distinguishes this case from that of Millington v. Fox. On the negotiation, the defendant offered to pay the costs of the suit as between party and party, while the plaintiff required them to be paid as between solicitor and client, to which he was not entitled. After this the answer was put in, and then the plaintiff offered to take the costs as between party and party, including the costs of the answer. The defendant refused this offer, but proposed that the costs should be paid as between party and party, up to the time of putting in the answer, but not the costs of the answer. After this was declined the cause proceeded, and it is for the Court to decide whether the plaintiff has fairly, reasonably, and properly, and without acting oppressively, required an answer to be put in. If he had a fair right to require that step, he had a clear title to sell it for such terms as he might think adequate, and it was equally the right of the defendant, if he thought fit, to refuse that bargain. I think that on two grounds the plaintiff, without acting oppressively or unreasonably, was entitled to have an answer; first, that his title might be recognised by the confession of the defendant, who had before disputed it; for, if that were not done, the record would present the fact of an injunction and an order for an action, and the former not got rid of, and the latter not proceeded in-and, secondly, because he was entitled to an account from the answer, as to the quantum of profit and the extent of the sale, and was not bound to be satisfied of the truth of an affidavit on that subject. The plaintiff, therefore, having such right to an answer, was equally entitled to offer to sell it at his own terms; and if that were so, he could call for the answer, if his

KELLY
9.

KELLY
v.
HOOPER

terms were not acceded to. They were refused, and he had the answer, and is right in now coming to the Court for his costs. The injunction must therefore be continued. No account is to be taken, as the plaintiff, by his counsel at the bar, has waived it, and the defendant must pay all the costs of the suit in this Court; but I shall not give any direction as to the costs of the action.

1842.

Jan. 17th.

Attorney-General v. Brandreth.

Testatrix bequeathed a legacy to her executors, to be settled by them, so that the interest might be yearly paid to the poor of the parish of O .:-Held, that it was a misapplication of the legacy to give it to the funds of a charity which extended over other parishes besides that of O., and which was regulated by a deed giving absolute control over the legacy to the directors of and subscribers to the charity.

Scheme directed, without a reference. THIS was an information filed by the Attorney-General, at the relation of the vicar and churchwardens of the parish of Ormskirk, for the purpose of obtaining an account of the principal and interest due on a certain charitable legacy bequeathed by the will of Mrs. Catherine Brandreth; and to have proper persons appointed trustees of the charity, and a scheme for the distribution of the fund among the poor of the parish of Ormskirk, according to the direction of the will. The testatrix by her will, dated in March, 1827, gave and bequeathed to the poor of the above-mentioned parish the sum of £200, to be settled by her executors so that the interest might be paid to them yearly.

At the time of the decease of the testatrix, there existed in the parish of Ormskirk a dispensary, supported by voluntary contribution, for the purpose of affording, free of expense, to the poor of that parish, and also of the adjoining parishes, medicines and medical attendance. Shortly after the testatrix's decease, the defendant Brandreth, the sole acting executor of her will, handed over the sum of £200 in payment of the legacy to the treasurer of that institution; and this sum, together with a sum of £800 arising from subscriptions, were applied in the purchase of a piece of land and a building, which were duly conveyed to trustees for the purposes of the charity.

The deed by which these premises were conveyed, and which was dated in October, 1832, contained a statement, that the charity was intended for the benefit of "the parish of Ormskirk and the adjoining parishes;" and there was a clause to the effect, that, if it should be declared by the subscribers to the charity that larger or more convenient buildings should be erected in Ormskirk instead of the building thereby granted, it should be lawful for the trustees to sell and absolutely dispose of the land, buildings, and premises of the charity by auction or private contract. the purchasers not to be bound to see to the application of the purchase-money, and that the trustees should stand possessed of the money arising from such sale, upon such trusts, and in such manner, as should be resolved upon, or decided by a general meeting of the directors and subscribers for the time being of the charity.

ATT.-GEN.

BRANDRETH.

It appeared that the parish of Ormskirk had received great benefit from the dispensary; 373 persons of that parish having been relieved in the year ending May, 1835.

The defendant had paid £20, the amount of legacy duty out of his own pocket.

Mr. Follett, for the relators, contended, that the legacy had been applied in a manner inconsistent with the trusts of the will, inasmuch as it had been appropriated to the use of other parishes than Ormskirk, and had also, by the terms of the deed, been placed under the controll of persons not contemplated by the testatrix. He cited Att.-General v. Comber (a).

Mr. Simpkinson, for the defendant, after commenting on the hardship of the case of his client, contended, that, by the terms of the deed, the parish of Ormskirk was suffiATT.-GEN.

ciently protected, as the poor of that parish were thereby primarily provided for. He referred to Wilkinson v. Malin (a).

THE VICE-CHANCELLOR.—I am placed under the necessity of deciding, that this legacy should be paid in a manner conformable to the trusts of the will; and, although there is a provision in the deed for securing the application of the fund in the shape of medical aid, yet, considering the trusts of the deed, both with regard to the persons to receive the benefit of the charity, and the extensive powers which the subscribers have over it, I regret to be compelled to decide against the defendant. It is clear that Mr. Brandreth intended what was liberal and beneficial to the charity. and I am not sure that he may not have done what was best for it. The Court, however, is called upon to say, whether, having regard to the provisions of the deed, this money has been properly applied, and I am obliged to decide that it has not. The relators, therefore, have a right to say, that the legacy is still due; and, if so, I am obliged also to say, that the costs of obtaining that legacy must be paid out of the estate of the testatrix.

As to interest, it is plain that the parish has had the benefit of this sum for a considerable time. I shall therefore give no interest beyond the time of filing the information. The legacy duty must be deducted.

I cannot send such a case as this into the Master's office.

The Court itself must direct a scheme.

Let the defendant pay into Court the sum of £180, being the amount of the legacy, after deducting legacy duty at £10 per cent., and interest thereon, at the rate of £4 per cent. per annum, from the time of filing the information to the day of payment; the amount to be verified by affidavit. Let the money, when paid in, be laid out. And let the dividends of the stock to be purchased be paid to the defendant during his life, or till further order, to be applied by him, with the approbation of

the vicar and churchwardens of the parish of Ormskirk for the time being, or the majority of them, including the defendant, every year, on Christmas eve, in providing clothing and fuel for such of the deserving poor, resident in the parish of Ormskirk, (whether parishioners or not, but not receiving out-door relief), as may be agreed upon. And after the death of the defendant, let the dividends be paid to the vicar of Ormskirk for the time being, (his identity to be verified by affidavit), to be applied by him, with the approbation of the churchwardens, or the majority of them, including the vicar, to the like purposes. Tax the relators their costs of this suit, and let such costs be paid by the defendant.

1842. ATT.-GEN. BRANDRETH.

### HUSHAM v. DIXON.

MR. SIMPKINSON moved, under the 8th of the Or- The Court will, ders of August, 1841, for leave to enter an appearance for the defendant. He produced sufficient evidence of the service of a subpæna, &c. (a).

renerally speaking, not act upon the strict terms of the 8th of the Orders of August, 1841.

Feb. 8th.

2 Hau. 16 1 Poll. 228.

THE VICE-CHANCELLOR, after adverting to the serious consequences which might arise from a strict adherence to the terms of this Order in all cases, and after observing that the 8th Order was not imperative upon the Court, said, that he thought that in this case some relaxation of it might be made. He therefore ordered that the plaintiff should be at liberty to enter an appearance within ten days, undertaking in the mean time to serve the defendant with a copy of the order made on the present motion within six days, unless the defendant should have appeared in the mean time (b).

(a) See 1 Hare, 159.

(b) In Crowder v. Foster, and Nash v. Parfitt, 21st February, 1842, his Honour adopted a similar course; observing, however, that it might not be advisable to adhere to this practice in every case, and that the additional expense occasioned by a departure from the strict terms of the order might, in some cases, be a reason for the Court acting upon the order in its literal sense.

1841.

#### MEMORANDA.

In Michaelmas Term, 1841, James Lewis Knight Bruce, Esq., and James Wigram, Esq., the Vice-Chancellors appointed under the stat. 5 Vict. c. 5, received the honour of knighthood, and were appointed members of her Majesty's most Honourable Privy Council.

In the Christmas Vacation, 1841—42, the Right Honourable Sir John Bernard Bosanquet, Knt., resigned his office of Judge of the Court of Common Pleas, and was succeeded by Creswell Creswell, Esq., one of her Majesty's counsel, who was thereupon called to the degree of the coif, and gave rings with the motto "Leges juraque," and afterwards received the honour of knighthood.

In the course of Hilary Term, 1842, the following gentlemen were appointed her Majesty's counsel, viz. Edward Wilbraham, Esq., of Lincoln's Inn, Wilkinson Mathews, Esq., of Lincoln's Inn, John Herbert Koe, Esq., of Lincoln's Inn, John Godfrey Teed, Esq., of Gray's Inn, William Loftus Lowndes, Esq., of Lincoln's Inn, Thomas Purvis, Esq., of Gray's Inn, John Walker, Esq., of Lincoln's Inn, Kenyon Stevens Parker, Esq., of Gray's Inn, James Russell, Esq., of the Inner Temple, Thomas Oliver Anderdon, Esq., of Lincoln's Inn, Robert Prioleau Roupell, Esq., of Lincoln's Inn, and Loftus Tottenham Wigram, Esq., of Lincoln's Inn,

1842.

COPPIN V. GRAY.

THE bill was filed by the personal representatives of In order to pre-John Plura against John Gray and Sarah his wife, and the trustees of their marriage settlement, praying payment out of Mrs. Grav's separate estate of three sums of £500, of equity in a £500, and £250. The bill alleged that Mrs. Gray, on the faith of her separate estate, had contracted to purchase of the Welch Iron Company a leasehold house and premises called Hartsheath, at £1700, and, for that purpose, of the right to had borrowed of Plura the three sums in question, for one of the subpans be which, namely, £500, Plura had originally given his acceptance, which he afterwards paid, to a bill of exchange piration of that drawn upon him by Mrs. Gray, at three months, dated November 13th, 1827, and made payable to the trustees of her settlement.

The defendants, Mr. and Mrs. Gray, by their answers, filed to enforce denied the existence of any such contract as in the bill the separate mentioned, but admitted that the advances in question had been made by Plura to Mr. Gray as his sole debtor; Mrs. Gray agreeing to advance to her husband out of her her in her sepaseparate estate the sums required to repay Plura, upon condition that such estate should be indemnified by means of a security upon Hartsheath. They further alleged that it was upon the expectation of such security being given. that Mrs. Gray signed the bill of exchange. They relied on the Statute of Limitations as a bar to the relief sought by the bill.

At the hearing of the cause the plaintiffs proved the bill of exchange. One of their witnesses, however, stated, that it was paid by Plura on the 15th of January, 1828. which was one month before it became due. As to the other sums, the plaintiffs failed in proving the allegations of their bill.

The bill was filed on the 12th February, 1834, when a VOL. I. N. C. C.

Jan. 13th. 14th.

vent the operation of the Statute of Limitations in a court matter of simple contract, it is sufficient if the bill be filed within six years after the accruer sue, although not sued out till after the experiod.

Quære, whether the Statute of Limitations can be pleaded in bar of a bill estate of a mar-ried woman of a bill of exchange given by rate capacity?

5. Bean. 418.

COPPIN v. GRAY.

subpæna was taken out, but not served. Afterwards, that is to say, in August, 1836, a subpæna was served on the defendants.

· Mr. Swanston and Mr. Beavan, for the plaintiffs.

Mr. Barlow, for the trustees.

Mr. Cooper and Mr. Kenyon Parker, for the defendants, Mr. and Mrs. Gray.—The bill of exchange having been paid on the 15th of January, the plaintiffs are barred by the statute. But supposing the evidence on this point to be a mistake, the plaintiffs are nevertheless barred, because the subpæna was not served till August, 1836, and it is the service of the subpæna, and not the filing of the bill, which prevents the operation of the statute. At law, even under the statute of James, there must have been a return non est inventus, and a new writ, in order to keep the action alive. The statute 2 Will. 4, c. 39, requires a more strict proceeding to render the Statute of Limitations inoperative. In bailable process, the plaintiff must arrest the party if possible; if the process is not bailable, he must serve the party. If the process is not served immediately, a new writ must be sued out within one calendar month after the expiration of the writ. Court adopts the analogy. [The Vice-Chancellor.—Have you any authority shewing the necessity of service of subpæna in any case depending on the Statute of Limitations? In the case of lis pendens it is often material; but the silence of the books on the other point may be thought to shew that there is a difference.] There is no express decision on the point, but it is submitted that the question may be determined by analogy. A bill in equity is only a petition asking for the process of the Court: Wheat v. Graham (a); Hyde v. Price (b). It was before the recent alterations

<sup>(</sup>a) 7 Sim. 61.

<sup>(</sup>b) 8 Sim. 578; C. P. Coop. 193.

analogous to the original writ at law. That writ was no bar to the Statute of Limitations, unless subsequent proceedings were had upon it: Lacon v. Lacon (a): and a bill can have no greater effect in that particular. The policy of courts of law and equity in matters of this nature is the same. [The Vice-Chancellor.—Your argument is, that the proceedings are nothing, unless the defendant has notice. Is notice to the defendant involved in all the alternatives mentioned in the statute 2 Will. 4. c. 39, sect. 10? In practice, if a plaintiff takes a writ to the sheriff, and asks for a return non est inventus, can he not get it, even since the statute, without service, or any attempt to find the defendant?] If the mere filing of a bill, without giving notice to the defendant either by serving him with a subpæna or otherwise, is sufficient to take the case as against him out of the Statute of Limitations, the consequences will be very serious to persons who are brought into a court of equity under such circumstances. In Sterndale v. Hankinson (b), it is said that the commencing proceedings in a court of equity will not prevent the operation of the statute.

COPPIN B. GRAY.

THE VICE-CHANCELLOB.—In this case, as to two of the sums sought to be recovered, there is a total absence of evidence, and there ought not, I think, to be a decree even for inquiry. So far, therefore, the bill must be dismissed with costs. But as to the third, that, namely, which is the subject of the bill of exchange or document of November, 1827, the plaintiffs have at least established a primal facie case. Indeed, the only defence substantially attempted has been upon the Statute or Statutes of Limitations supposed to be applicable to the subject.

Independently of the time when process was served, the bill must, I conceive, be taken as filed within time; for it Coppin v. Gray.

was filed on the 12th of February, 1834, and the bill of exchange ought not to be taken, I conceive, as having been at complete maturity before the 14th or 15th of February, 1828. The point mainly contested has been, whether, as there was neither service of process nor appearance until the year 1836, the plaintiffs' remedy is not barred; that is, whether the six years ought to be reckoned back from such service or appearance, or from the filing of the bill.

In a sense and for some purposes, it is true that there is not in this court a lis pendens before service of process on the defendant, or his appearance without such service. But on my request during the argument to be furnished with authority in support of the defendant's proposition, that the time of the service or appearance was the time from which to reckon back for the purpose of a defence in the suit, founded, whether directly or by analogy, on either of the Statutes of Limitations, I was informed that no such authority could be found. Certainly my own recollection does not suggest the existence of any such authority. The proposition seemed, and does still seem, to me not supported by the accustomed forms of pleading, or by the language of judges in reported cases, or of writers in text books. The time of filing the bill is the period which for this purpose, I believe, is generally, if not invariably, referred to. If, however, it would be clearly a departure from the principle of decided cases to dissent from the proposition which I have mentioned, I should not regard the absence of a specific precedent, but would, without such a precedent, act upon a principle that I found established. I do not, however, see that the proposition is clearly based on principle. It is not, I conceive, supported by any analogy to the course of proceedings at common law, antecedently to the statute of King William the Fourth, which was quoted at the bar; and if by reason of the statute or otherwise, that which, as I consider, would be a new

rule, is to be introduced into this court, it ought, in my opinion, to be introduced by higher authority than mine.

It has been said that great inconvenience must arise from not assenting to the defendant's doctrine; inasmuch as a bill might be filed, nothing done upon it for a quarter of a century, process then served, and the Statutes of Limitations excluded by the mere fact of the time of the filing of the bill. Upon this there are some observations very obvious. In the first place, if there is any solid foundation for the argument, how are we to account for the silence of the books on a matter of such probably frequent occurrence? In the next place, the courts of law seem to be, or at least to have been up to the last reign, substantially under a dispensation of equal inconvenience, if inconvenience there be; and, thirdly, in a case of gross or improper delay between the time of filing a bill and any further proceeding in the cause on the part of the plaintiff, a court of equity does not require any such rule to enable it, in the exercise of the judicial discretion belonging to it. to deal effectually with such a plaintiff, and to provide amply for the protection of a defendant so circumstanced,

In the present cause, however, no such case is made by the answer. The benefit of the Statute or Statutes of Limitations, if claimed with reference to the bill of exchange, is claimed in merely general terms; the defendant not alluding to the process, or stating matter calculated to call the plaintiff's attention to the particular line of defence taken at the bar. Had the answer been otherwise framed, the plaintiff might, by supplemental bill, or in some other mode, have met and displaced the objection, if any. The mere case, indeed, arising from the production of the *subpana* of 1836, which is all the support in evidence that Mrs. Gray has for the argument, is not of itself strong. I have not adverted to the

making the case by his answer.

COPPIN U. GRAY.

Coppin v.

defendant's suggestion, that the bill, if paid by Mr. Plura, was paid as early as January, 1828. There is not, I think, legal evidence of that; and if there were, the mere fact that he paid the bill before the time when according to its tenor it became due, would not, I apprehend, give him a right of suit before that time against the drawer, by way of loan to whom he accepted it.

On the whole, without expressing or intimating any opinion whether it would be wholesome or useful to adopt such a rule as that for which the defendant contends. I decline making the precedent; and I must refer it to the Master to take an account of what is due to the plaintiffs for principal and interest upon the bill, and declare that they are entitled to have the amount of what shall be found due to them raised or paid out of the separate estate of the defendant Mrs. Gray, of which the other defendants are the trustees; and let the defendants the trustees be restrained until further order from making any payment in respect of such separate estate, or the income thereof, otherwise than under the order of this Court; and reserve the payment of the costs of so much of the bill as has been dismissed, and reserve further directions and all other costs, with liberty to apply.

Before parting with this case, I wish to add, that I desire not to be considered as deciding that the limitation of six years is or is not applicable under any circumstances to a demand such as that on the bill of exchange in question here upon the separate estate of a married woman. I have assumed its applicability for the purpose of the argument.

VICKERS v. OLIVER.

WILLIAM CHENEY HART, formerly of Hope Bowd- Upon the death ler, in the county of Salop, Esquire, by his will dated the 21st May, 1818, gave and devised all that dwelling-house, in Barker-street, Shrewsbury, describing it as the late residence of his brother, and by him devised to him, the testator, in fee, unto his the testator's sister, Hannah Chenev Hart, for life; and, after bequeathing several pecuniary and spe. cific legacies to various persons, amongst whom was Anne Marsh, he ordered that all his just debts, funeral expenses. and all the legacies given by his will, should be payable out of all his estate, real and personal; and he gave, devised, and bequeathed all his property and estate, real and of all his estates. personal, whatsoever and wheresoever, in possession, reversion, or remainder, unto the Rev. George Watkin Marsh, his heirs, executors, and administrators, upon trust to raise by sale or mortgage of all or any part thereof, a sufficient sum to pay off all such his debts, and the said legacies, and all other incidental expenses. And he empowered the trustee to give receipts, &c. And as to the upon whose surplus of all his property, real and personal, he gave the same absolutely to his natural sons, Robert and William Mainwaring, as tenants in common, and in case of their after M.'s both dying under twenty-one, to his heirs or heirs-at-law; and he appointed the Mainwarings and George Watkin Marsh executors of his will.

1842.

Jan. 26th. 31st.

of a testator who had devised his real estates for payment of his debts, a bill was filed on behalf of his creditors, both by specialty and simple contract, to have his assets administered and his real estates marshalled. In that suit a receiver was, in 1821, appointed It was afterwards discovered that the testator had died seised of an estate which had not passed by his will but had descended to his heiressat-law, M., death, in 1822, it descended to O. In 1840. death, a supplemental bill was filed against O. by one of the plaintiffs in the original suit, being a simple contract credi-

tor of the testator, praying to have the benefit of that suit as against the descended estate:-Held, that as the original suit was treated as a suit for the administration of all the testator's real estates, and as the plaintiff sought to affect the descended estate by standing in the place of the specialty creditors, he was not barred by the Statute of Limitations, but was entitled to have the descended estate marshalled in his favour.

A simple contract creditor who has acquired a right of marshalling real estate is not barred

by the lapse of less than twenty years.

Testator devises all his real estate in trust for the payment of his debts. At the time of making his will he is tenant in fee of several estates, and tenant in tail, with remainders over, with remainder to himself in fee, of an estate called B., of which he afterwards suffers a recovery and dies without republishing his will. Quære, whether, in the administration of his assets, the estate B. is applicable to the payment of his specialty creditors before the devised estates?

VICKERS v. OLIVER. The testator, at the time of making his will, was not, as he considered himself, tenant in fee under his brother's will of the house in Barker-street, but tenant in tail, with remainder to his sisters in tail, with remainder to himself in fee. He afterwards suffered a recovery of that estate, and died on the 28th December, 1818, leaving Sarah Cheney Marsh, wife of George Watkin Marsh, his only sister, and heiress-at-law; his other sister, Hannah Cheney Hart, having died in his lifetime, without issue.

George Watkin Marsh proved the testator's will, and entered into possession of the testator's real and personal estate, the Mainwarings being infants.

On the 24th February, 1820, the plaintiff and his partner John Pritchard, being simple contract creditors of the testator, filed their bill on behalf of themselves and all other the creditors of the testator, two of whom were stated to be specialty creditors, against Mr. and Mrs. Marsh (the latter being alleged to be the heiress-at-law of the testator), and against the legatees under the testator's will, praying for the administration of the testator's personal estate; and, if necessary, that the testator's will might be established, and an account taken of the estates which the testator was seised of or entitled to at the time of his death, and that a sufficient part thereof might be sold; and, if necessary, that the assets might be marshalled.

In the answers which were put in to this bill, the house in Barker-street was not treated otherwise than as passing under the testator's will; and an order was afterwards made for a receiver of all the estates. In March, 1822, after putting in her answer, and after publication passed, but before the hearing of the cause, Mrs. Marsh died. By the decree at the hearing, an inquiry was directed as to what estates the testator died seised of, and it was ordered that, if necessary, a competent part thereof should be sold; and it was declared that such decree should be

binding on Anne Marsh, who was then considered to be the heiress-at-law of Mrs. Marsh and the testator.

It subsequently appearing that Anne Marsh was the daughter of the defendant, Marsh, by a former wife, and that the defendant, Oliver, was the testator's heir-at-law, he, in December, 1828, executed to Marsh, as the trustee under the testator's will, a release of all his estate, right, title, &c., in, to, or out of all the freehold and copyhold hereditaments either in possession, reversion, or remainder, late of the said testator and devised to the said George Watkin Marsh by the said will, upon the trusts thereof.

Under the decree above-mentioned the greater part of the testator's real estates, exclusive of the estate in Barker-street, was sold, and the produce applied, together with his personalty, in discharge of his specialty debts; but his simple contract creditors, including the plaintiff, were or were alleged to be unpaid.

In August, 1840, the plaintiff, as the surviving partner of Pritchard, filed the present bill against Oliver and against William Henry Wood, who was alleged to be the trustee of a mortgage term in the estate in Barker-street, the mortgage having been paid off out of the testator's personal estate.

The bill alleged that the plaintiff had lately discovered, as the fact was, that the testator was not seised in fee of the estate in Barker-street at the time of making his will; that he had died intestate as to that estate; that it had descended to Sarah Cheney Marsh, the testator's heiressat-law, and from her to Oliver as her heir-at-law; and that Oliver had been in possession since the death of Sarah Cheney Marsh.

The bill, after charging that the plaintiff had been led to believe from the answer of Mrs. Marsh in the former suit that all the real estates of the testator passed by his will, although he and his then co-plaintiffs had instituted that suit in respect of all the real estates of which the tesVIOKERS 9. OLIVER. VICKERS 0. OLIVER.

tator was seised at his death, prayed that the plaintiff might have the same benefit of the former proceedings against Oliver as if he had been made a party thereto on the death of Mrs. Marsh; and that, it appearing that the devised estates remaining unsold were not nearly sufficient for payment of the plaintiff and the other simple contract creditors of the testator, it might be declared that they were entitled to satisfaction to that extent out of the descended estates; or in case the Court should be of opinion that Oliver was not bound by the former proceedings since the death of Mrs. Marsh, then, that the real and personal estate might be administered, and if it should appear that the personal estate had been properly administered in payment of the specialty debts, then, that the plaintiff and the other simple contract creditors might be satisfied and paid out of the estate in Barker-street and any other of the testator's descended estates, &c. Lastly, that this suit might be considered and taken as a supplemental suit to the former.

The defendant Oliver, by his answer, insisted that the plaintiff and the other creditors of the testator ought not, at that distance of time from his death, to be permitted to make any claim or demand in a Court of equity against him as the heir-at-law of the testator and Sarah Cheney Marsh in respect of the descended estate of the testator; and he averred that the cause of suit (if any) against him touching or concerning the descended estate of the testator did not first accrue to the plaintiff and the other creditors of the testator at any time within twenty years next before the commencement of this suit; and he insisted upon the full benefit of the Act of Parliament passed in the third and fourth year of his late Majesty King William the Fourth, intituled &c. (a), in the same manner as if he had pleaded the same.

Mr. Russell and Mr. Bigg, for the plaintiff.—The descended estate is applicable immediately to the payment of the plaintiff's debt. Donne v. Lewis (a) and Manning v. Spooner (b) are authorities to shew that if particular estates be selected and devised for the payment of debts, they being so selected must be applied to that purpose before the descended estates; but that unless they are so selected, the descended estates will be primarily applicable. Unless, therefore, the plaintiff's right is affected by the decision in Milnes v. Slater (c), he has ground for contending that, as here there is a general devise upon trust to pay debts and legacies, there is no particular estate selected for that purpose, and that the case comes within the rule laid down by Sir John Leach in Barnewell v. Lord Cawdor (d), that, to exonerate the descended estates, there must not only be a clear intention to subject the devised estates to the payment of the debts, but also a clear intention that the descended estates should not be subject to the payment of the debts. It must be admitted, however, that in Milnes v. Slater, Lord Eldon went a great length in favour of descended estates; holding, that although upon the will there was a general trust for payment of debts out of the real estate, yet after-purchased lands were not to be applied in ease of the devised estates in payment of mortgage debts. Here, however, the Court is not dealing with after-acquired estate in the same sense as in Milnes v. Slater. At the time of making his will the testator had a devisable interest in the estate in question, namely, the reversion in fee. He had clearly no intention that his debts should be paid out of any fund not including that estate.

This view of the case, however, is not necessary for the plaintiff, because he has an ultimate right at least to have the descended estate marshalled in his favour. The ori-

VICEERS

OLIVER.

<sup>(</sup>a) 2 Bro. C. C. 257.

<sup>(</sup>c) 8 Ves. 295.

<sup>(</sup>b) 3 Ves 114.

<sup>(</sup>d) 3 Madd. 449.

VICKERS 9. OLIVER. ginal bill prays for an account of all the estates of which the testator died seised; the decree in terms operates upon all those estates, and under that decree the specialty creditors have been paid. [The Vice-Chancellor.—Must you not shew that if Mrs. Marsh had not died, and, between publication passed and the hearing in the former suit, you had discovered descended estates, you would have been entitled without more to have those estates marshalled as against her? It is not alleged in the former bill that there were descended estates.] It was alleged that Mrs. Marsh was heiress-at-law. But even if the suit had not been framed with a view to marshalling, the Court would, if necessary, have directed the estates to be marshalled, without compelling the plaintiff to file a supplemental bill: Gibbs v. Ovgier (a).

Mr. Simpkinson and Mr. William Eagle, for the defendant Oliver.—The cases of Milnes v. Slater and Manning v. Spooner are not, in principle, distinguishable from each other. In both a trust was created for payment of the testator's debts out of particular estates. Now, although a mere charge of debts upon devised estates will not exonerate the descended estates, yet, where there is a trust for payment of debts, the Court will throw that trust on the devised estates before resort is made to the descended estates.

The plaintiff, however, does not so much rely upon this point as upon his right of marshalling. But the question is whether he has filed a bill upon which the Court can grant relief by marshalling the assets. Where a bill appears upon the whole to be framed with a view to such relief, the mere omission of it in the prayer may be immaterial. But here the original bill was not so framed. It contained no allegation of estates having descended, and

was directed almost entirely to the execution of the trusts of the will and the consequential relief. It was moreover filed by a simple contract creditor and specialty creditors as co-plaintiffs. But how could they join as co-plaintiffs in a suit for marshalling the assets? Their interests in that respect would be so completely at variance with each other, that, considering the bill as a marshalling bill, the Court would dismiss it for misjoinder of plaintiffs.

VICEERS v.

Lastly, this bill, which is called a supplemental bill, is filed eighteen years after the accruer of the defendant's title: but in the common case of a personal demand, and this is nothing more, a bill of revivor cannot be filed after six years.

Mr. Oliver, for the defendant Wood.

Mr. Russell, in reply.

THE VICE-CHANCELLOR.—In this cause the plaintiff was a creditor by simple contract of William Cheney Hart, who died in the year 1818. He was not a trader; and except by force of his will, his simple contract debts could not affect his real estates farther than as that consequence may be produced by marshalling; and marshalling is a main object of the present bill. His will devised all his real estates to George Watkins Marsh, in trust to sell and to apply the produce in paying the testator's debts. At the date of this will, it is admitted that he was seised in fee-simple in possession of some freehold property, and seised as tenant in tail, with remainder to his two sisters as tenants in common in tail, with cross remainders between them in tail, with remainder to himself in fee, of a messuage in Barker-street, Shrewsbury, in which his deceased elder brother, whose devisee and heir he was, had formerly resided. This messuage the will of the testator in the cause describes and treats, as if it had been part of the estate of

Jan. 31st.

VIORERS V. OLIVER. which he was seised in fee-simple in possession. It is admitted, that after the date of his will, he suffered a recovery of the messuage, by which he barred the estates tail, and acquired the fee-simple of it in possession, and that he did not in any other manner revoke, and did not republish his will, which was proved by the trustee, one of his executors, the husband of his only surviving sister and heiress, Mrs. Marsh. The other sister is admitted to have died in the testator's lifetime without issue.

Though the messuage formerly entailed then descended on Mrs. Marsh, not affected by the will, this view of the case does not appear to have suggested itself in her lifetime.

Soon after the testator's death, certain creditors of the testator, by specialty and simple contract, (including Mr. Vickers, the sole plaintiff on the present occasion), filed a creditors' bill against Mr. and Mrs. Marsh, and certain other persons claiming interests under the will. The plaintiffs appear to have considered the messuage in Barkerstreet as well devised by the will. The entail and recovery are not noticed by them, and their bill treats the messuage as part of the estates of which the fee-simple in possession was well subjected to all the testator's debts. The same view of the case appears to have been taken by the defendants in that cause. The bill was answered, and afterwards, in 1821, a receiver was appointed of the testator's estate—a proceeding which certainly was intended to include the messuage in Barker-street. cause was put at issue, witnesses were examined, and the evidence published; in which state of the cause, after publication, but before hearing, Mrs. Marsh, in the year 1822, died.

It appears to have been supposed, that she left a lady, named Anne Marsh, her daughter and heiress. Anne Marsh was already a party to the suit, and it was thought right to continue the proceedings, without any bill of revivor or

supplement, and the proceedings were continued accordingly. A decree was obtained in the suit, under which it is admitted, that accounts were taken, and the devised estates, or some of them, were sold. But it does not appear, and there is no reason to believe that the creditors of the testator have been fully paid; or, in particular, that the present plaintiff has been paid.

In or before the year 1828, it was discovered, that Mrs. Marsh, had, in truth, died without issue: and that, upon her death, the present defendant, Mr. Oliver, became her heir, and the heir of the testator. Mr. Oliver was requested to execute, and did execute a deed, in 1828, confirming the will, but not intended to have any other effect than that of acknowledging the testator's sanity, and its due execution and attestation, as I understand. At what time it was first discovered that the will did not affect the messuage in Barker-street does not appear. But, in the year 1840, the present bill was filed, for the purpose of obtaining the benefit of the former suit, and having the assets marshalled against Mr. Oliver, and so indirectly subjecting the messuage in Barker-street to the testator's simple contract debts. The bill has also for its object to obtain the benefit for the testator's creditors of a mortgage term on this same property. The mortgage was paid off by Mr. and Mrs. Marsh, as it is alleged, and probably with truth, out of the testator's personal estate. The term was vested in the late Mr. Wood, of whom one of the defendants is the personal representative, in trust for Mrs. Marsh, her heirs and assigns.

Mr. Oliver's defence to this bill it is the province of the Court now to consider. This defence is founded on length of time, and the statutes, or one of the statutes, of limitations, and seems to raise two questions: first, whether the messuage in Barker-street, was by the original suit effectually brought into litigation, so as to have been, if Mrs. Marsh had not died, and that suit had been heard

VICERRS 9. OLIVER.

VICKERS

v.
OLIVER.

and efficiently proceeded with against her, capable of being dealt with under the first bill, for all the purposes of creditors, without amendment and without supplement; secondly, whether, if it was, the length of time which elapsed before the filing of the present bill, bars the present plaintiff's remedy against Mr. Oliver. As to both points, I have felt some doubt; but upon reflection, I have come to the conclusion, that each of them ought to be decided in favour of the plaintiff.

In the first bill, there is certainly, to borrow an expression used by Lord Eldon, great penury of allegation. suggests however, the possibility that there might be real estates of the testator, which Mr. and Mrs. Marsh might, effectually or otherwise, contend not to have passed under his will. It contains interrogatories, addressed to such a state of things; and the prayer, in terms, extends to all the freehold estates of which the testator was seized at his death, and to marshalling. Had the answers brought forward the true case, with respect to the messuage in Barkerstreet, the plaintiffs might have amended; but no such thing was done. The answers, as well as the bill, proceeded upon the notion that the testator, at the date of his will, was seised in fee-simple in possession of the messuage in Barker-street, and that the will was not revoked; and in this state of the record, a receiver is appointed of the estates, the cause is put at issue, witnesses examined, and the evidence published. Now, though I do not forget that Mrs. Marsh was all this time under coverture, yet, I cannot conceive, that, had the cause been brought to a hearing in her lifetime, and had the true state of the title to the messuage in Barker-street been then suggested at the bar, or had it then been suggested at the bar, that there were any descended freehold estates, it would not have been competent to the Court, and due to justice, to have inserted in the decree such directions as would have produced a report from the Master, shewing what descended

freehold estates there were; upon which report, and upon further directions, it would, in my opinion, have been equally competent to the Court, and due to justice, to have made that property available to the creditors, whether directly or by marshalling, according to their rights. think that such a course of proceeding would not have been contrary to any rule of practice or pleading existing in this Court, a view supported by the case in 12 Veseu (a). before Sir William Grant. That case is not, it is true. precisely, and altogether, in point, but has considerable analogy to the present. I feel myself therefore bound to hold, that at Mrs. Marsh's death, the property was in litigation at the suit of the original plaintiffs, of whom the present plaintiff, a simple contract creditor, is one. He has not exempted himself from the charge of considerable delay in bringing forward the present claim. The long lapse of time between Mrs. Marsh's death, in 1822, and the institution of the present suit in 1840, is not satisfactorily accounted for; but, on the whole, as I have said, notwithstanding Hollingshead's case (b), and others of that kind, there is not, I think, enough to warrant the Court in dismissing the bill, wholly or partially. I must consider the order for a receiver made in Mrs. Marsh's lifetime as intended to affect, and as containing words sufficient to embrace, the messuage in Barker-street. That order does not appear to have been discharged or varied; and though there is not, as far as I am aware, any evidence that the receiver ever took possession or received rent of this property, it is admitted that Mr. Oliver neither had possession nor received rent of it before the year 1837, when he claimed and received from the occupying tenant rent for some previous years. It must be remembered also, that it is only under the right of the specialty creditors, that the simple contract creditors seek to affect the descended

VICKERS

V.

OLIVER.

(a) 12 Ves. 413.

(b) 1 P. W. 742.

VOL. 1.

VICKERS

OLIVER.

estate by standing in the place of specialty creditors paid out of the personal estate. The amount of the personal estate, the mode and time of its application, and the amount and circumstances of the specialty debts, are not in proof upon the present occasion; but there does seem reason to believe that the testator's personal estate is entitled to the benefit of the mortgage vested in Mr. Wood.

Upon the whole, considering all the special circumstances of the case, I am of opinion, entertaining the view which I do of the nature and capabilities of the first suit, that I must hold the present plaintiff, though merely a simple contract creditor, not precluded by length of time. I must therefore give him the usual decree against Mr. Oliver, including a direction for marshalling as to the descended estates, and the benefit of the former proceedings, so far as they took place in Mrs. Marsh's lifetime. So far as they took place after her death, they are ineffectual against Mr. Oliver; but I will give the Master power, with the consent of the parties to this suit, if they shall so consent, to adopt any of the proceedings subsequent to Mrs. Marsh's death.

The receiver must be continued, and there must be an inquiry by whom, and out of what fund, the mortgage now vested in Mr. Wood was paid off, and the Master must have liberty to state any special circumstances. The reference should go to the Master in the original cause. I understand it to be admitted, that the late Mr. Wood, the trustee of the mortgage term, was assignee of Mr. Marsh's estate under his insolvency, and has been succeeded in that office by his personal representative, the present Mr. Wood, one of the defendants.

At the conclusion of the judgment the counsel for Mr. Oliver said, that they would consent to the adoption in the present suit of the proceedings in the original suit, which took place subsequent to Mrs. Marsh's death.

1842.

Jan. 20th.

### SMITH V. BAKER.

By an indenture dated the 30th March, 1815, and made J. S., under the between Elizabeth Baker, widow, and Thomas Charles Baker, described as only son and heir-at-law of the said Elisabeth Baker, of the one part, and Thomas Martin of the other part, certain lands at Sitwell and Brightwell in the county of Berks were, in consideration of a sum of money expressed to have been advanced by Martin to Elizabeth Baker and Thomas Charles Baker, demised to Martin, his executors, &c., for a term of 500 years, with a proviso for making void the said term, on payment to Martin, his executors. &c., by Elizabeth Baker and Thomas Charles Baker, their heirs, executors, or administrators, or any or either of them, of the mortgage money and interest as therein mentioned.

This mortgage was afterwards assigned to the plaintiff Catherine Smith, by an indenture dated the 18th April, 1817, to which Mrs. Baker and her son were parties. this occasion, and from time to time afterwards, further advances were made to them by the plaintiff, and on the transaction 22nd July, 1830, they executed to the plaintiff a deed of further charge on the same premises. In the deed of assignment to the plaintiff, the mortgagors were described that J. S., unin the same manner as in the original mortgage-deed, and the proviso for redemption was similar. In both deeds, the mortgagors covenanted that they, or one of them, had a good title &c. and for further assurance.

By indentures of lease and release and assignment dated respectively the 21st and 22nd days of June, 1832, the latter deed being made between Thomas Charles Baker, of the first part, Isaac King, William Toovey, and Holland Thomas Birkett of the second part, and several other persons, creditors of the said Thomas Charles Baker, who should execute the said release, of the third part, reciting

belief that he had the fee-simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title and for further assurance. It turned out that at the time of the conveyance the mother had the fee-simple, which upon her death descended to J.S. as her heir-atlaw :-Held. that, although no estate passed by the conveyance, yet the amounted to a contract for sale of the specific estate, and less he could set aside the contract for fraud, was in equity compellable to carry it into execution.

SMITH

V.
BAKER.

that the said T. C. Baker was seised in fee-simple of a messuage or tenement, farm, lands, and hereditaments, with their appurtenances, situate, lying, and being at Sitwell and Brightwell, in the county of Berks, subject to a mortgage thereof by him to the plaintiff, but the particular amount of such mortgage debt could not be then ascertained with any certainty; and also reciting that the said T.C. Baker was entitled to certain other property therein particularly mentioned, and that he stood indebted to the said Isaac King, William Toovey, and Holland Thomas Birkett, and divers other persons, and being unable to make immediate payment and satisfaction to his said several creditors, had agreed to convey the said messuage or tenement and premises at Sitwell and Brightwell aforesaid, and also to assign and make over his other property therein mentioned, unto the said King, Toovey, and Birkett, their heirs, executors, administrators, and assigns, upon the trusts thereinafter declared, and for the benefit of the creditors of him the said T. C. Baker, and in full payment, satisfaction and discharge of the several debts due to them respectively, which they, the several persons parties thereto of the second and third parts, did thereby agree to accept and take in full of their said debts. and did release and discharge the said T. C. Baker of and from the said several debts: It was witnessed, that, in consideration of the premises, &c., the said T. C. Baker granted. bargained, sold, released and confirmed unto the said King, Toovey, and Birkett, all that, &c., [describing the property at Sitwell and Brightwell], and also all other (if any) themessuages, cottages, lands, tenements, hereditaments, and real estate whatsoever of him the said T. C. Baker, whether in possession, reversion, remainder, or expectancy, and all the estate, right, title, use, trust, benefit, property, possession, inheritance, claim, and demand whatsoever, at law and in equity, of him the said T. C. Baker, of, in, to, or out of the said premises, or any part thereof, to hold the same (subject to the said mortgage to the plaintiff Catherine Smith

said) unto the said King, Toovey, and Birkett, their heirs and assigns, upon trust, to sell and dispose of the said messuage and hereditaments in manner therein mentioned, and to stand and be possessed of the net money thence arising, after discharging and satisfying the mortgage debt affecting the same, and also after deducting the costs of sale, upon trust, in the first place to pay and discharge the costs of preparing the release &c., or otherwise incurred in the execution of the trusts, and, after paying certain sums therein particularly mentioned, to pay the net residue of the monies arising by the ways and means aforesaid, as far as the same would extend, unto and among the said King, Toovey, and Birkett, and all the other creditors of the said T. C. Baker, who should execute the said release rateably and proportionally according to the amount of their respective debts, without any preference or priority, and in full discharge of their said several debts. The deed contained an assignment of personalty upon the same trusts. It also contained an express covenant, that T. C. Baker, at the time of the execution thereof, was seised of an estate in fee-simple, of and in the hereditaments therein expressed to be released, and had in himself good and full power to release and convey the same, subject to such mortgage to the plaintiff as aforesaid, and also to assign the personal estate thereinbefore mentioned to be assigned, in manner and upon the trusts thereinbefore also mentioned, and that all and singular the said several premises should remain and be to the uses, upon the trusts, and for the intents and purposes aforesaid.

This deed was executed by Baker, and also by the trustees and several other creditors, whose debts amounted to £1670 and upwards; and the creditors subsequently received a dividend of 10s. in the pound out of the personal estate.

In April, 1834, Mrs. Baker died, after which the plaintiff filed the present bill against Thomas Charles Baker, SMITH O. BAKER.

1842. Smith

BAKER.

and against King, Toovey, and Birkett, for a foreclosure of the premises.

The defendant Baker, by his answer, stated that he had lately, and since the filing of the bill, discovered that at the time of the execution of the indentures of June, 1832, the mortgaged premises were, by virtue of certain settlements made many years back, vested in his mother in fee, whereas he had executed those indentures under the impression that his mother was entitled for life only, and that he was entitled to the fee-simple, subject to her life interest. He therefore submitted, whether the other defendants took any interest in the equity of redemption of the premises.

Upon the cause coming on for hearing before Lord Cottenham, C., his Lordship declared that the plaintiff was entitled to a decree of foreclosure, and he referred it to the Master to inquire whether the defendants, King, Toovey, and Birkett, had any and what interest in the mortgaged premises, under the indentures of June, 1832.

The Master reported, that the effect of the indentures of June, 1832, was to transfer to the last-named defendants all the interest which Thomas Charles Baker then had in the equity of redemption, and that the plaintiff could not effectually foreclose the mortgage term without barring that equity; and that though the recital in the deed of release of the 22nd June, 1832, that Thomas Charles Baker was seised in fee-simple of the premises subject only to the mortgage, was inaccurate, yet it was true to this extent, that he had then in him the equity of redemption, or an interest in the equity of redemption, by express contract with the mortgagee.

To this report the defendant Baker took exceptions, on the ground that at the time of the execution of the indentures of June, 1832, he had no interest whatever in the premises, and that consequently no interest was conveyed by those deeds to the other defendants. He

then set out various deeds of April, 1799, March, 1800, and March, 1802, which had been used before the Master, by which it appeared that the legal estate in the premises was outstanding in a Mr. Newton, who was not a party to the mortgage deed of 1815, or any subsequent deed; and he submitted that, under the circumstances, the indenture of release of June, 1832, did not operate against him by estoppel.

1842. Smith

BAKER.

## Mr. Kenyon Parker and Mr. Glasse, for the report.

Mr. Lee and Mr. Randell for the exceptions.—The Master has given a wrong construction to the instruments. Admitting, for the sake of argument, that they might amount to a contract, he has treated them as a conveyance. [The Vice-Chancellor.—I agree with you, that the instruments gave no interest, and that there was no conveyance, The question is, however, whether the deed of 1832 was not an available contract of charge on the estate.] At the time of the execution of that deed, the defendant was under a misapprehension of his rights. Under such circumstances it will be no estoppel to him in equity. whatever it might be at law (a). Besides, when he executed it, he had a mere hope of succession, a mere possibility of succeeding to his mother's estate. The Court is jealous of transactions of this kind with heirs apparent, and it has been laid down without qualification that a mere hope of succession is not the subject of con-[The Vice-Chancellor mentioned the case of Beck-

(a) In Bensley v. Burdon, 2 S. & S. 519, it was held that a conveyance by lease and release of an estate which a party had not at the time of the conveyance operated, at law, as an estoppel to him and his assigns; and that decision was affirmed by Lord Eldon. In Right

v. Bucknell, 2 B. & Ad. 278, where the conveyance was by lease and release, it was held that there was no estoppel; but that case is distinguishable in its circumstances from the former. See an able article on this subject in the Jurist, Vol. 5, pp. 858, 1170. SMITH U. BAKER.

ley v. Newland (a). ] In Carleton v. Leighton (b), it is laid down by Lord Eldon that the expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor) is not an interest, and is not capable of being made the subject of assignment or contract. Wright v. Wright (c). The Court will look at all the circumstances of the contract. We do not deny that King, Toovey, and Birkett might file a bill to enforce the covenant for further assurance, but the question now is whether they have any and what interest. [The Vice-Chancellor.—Mrs. Baker is dead, and her estate has descended upon her son]. Still the right of the other defendants rests in contract only, and must be carried out by the decree of the Court before it can be turned into an interest.

In the course of the argument, upon the Vice-Chancellor referring to that class of cases where a man who has no title sells an estate and upon afterwards acquiring a title is compelled to make good the title to the vendee, the counsel in support of the exceptions cited Noel v. Bewley (d).

In answer to a question put by the Court, it was admitted that no bill had been filed by Baker against the other defendants to set aside the deeds of 1832.

Mr. Parry, for the other defendants, was stopped by the Court.

THE VICE-CHANCELLOS.—The plaintiff being mortgagee with undoubted priority, filed his bill against several parties, each claiming an interest in the estate. Of these defendants, one denied that the others had claims. It was therefore necessary, in the opinion of the judge who heard

<sup>(</sup>a) 2 P. W. 182.

<sup>(</sup>c) 1 Ves. sen. 411.

<sup>(</sup>b) 3 Mer. 671.

<sup>(</sup>d) 3 Sim. 103.

the cause, in order to do justice to the plaintiff and defendants, to ascertain first whether all the defendants were interested in the equity of redemption. He therefore directed an inquiry, with liberty to the Master to state special circumstances. That made the defendants actors in the Master's office. They entered into the controversy accordingly, and the Master has found that some of the defendants have that right which the other denied. An exception has been taken to the Master's report, and the exception turns on this:—that Baker, who contends that the other defendants have no right, was, when he executed the conveyance under which they claim, heir-apparent only of the person seised in fee of the property, and not having any interest, was unable to convey any interest; and it is said that he acted under an erroneous notion of his title. that fact being evidenced by his own affidavit, and the recital in the deed. I am not sure that the affidavit and deed agree. The deed describes him as being entitled to the fee-simple in possession: the affidavit alludes to his mother as having a life interest. I do not think, however. that this variation is very material. He has dealt with the property not generally, but upon a specific contract for value, in the same manner as if he had sold the specific estate. He holds out to the creditors, not his property generally, but this particular property; and upon the ground of the property specified being appropriated to pay his debts, he is released. Therefore, to all substantial intents this was a sale by him of the property.

It may be that he did not know what his interest was at the time; but upon the mere circumstances which appear here, he cannot be allowed to deprive his creditors of an estate of which he disposed to them for valuable consideration. It is not sufficient for him to say that he then had no interest in it—that he acquired subsequently the estate which he said he had, and which he may or may not have supposed himself to have had, at the time of the execution

SMITH U. BAKER SMITH U. BAKER. of the deeds of 1882. Whether the Master has arrived at the conclusion to which he has come, and which I think is the right conclusion, by correct steps, I do not say. Perhaps I may differ from him as to so much of the case, and agree so far with the argument of Mr. Lee. But I see enough to satisfy me that there was a contract for value, by deed, for the sale of this specific estate to the creditors; and I cannot relieve the party from the effect of that contract.

I think, however, that the exceptions were in some degree justified. I shall, therefore, not overrule them, and shall allow the excepting party to take back his deposit.

Take an account of what is due to the plaintiff for principal, interest, and costs on her mortgage, &c. Declare that, by virtue of the indentures of the 21st and 22nd June, 1832, the defendants, King, Toovey, and Birkett, have an equitable interest in the estate in question, subject to the plaintiff's mortgage. Declare that the defendants, King, &c., are entitled to redeem the plaintiff, and in case they shall not redeem within six months from the date of this decree, then the defendant Baker to be at liberty to redeem the plaintiff. And on the application of the defendants, declare, that, as between the defendant Baker and the other defendants, the decree shall be without prejudice to any bill which the defendant Baker may file against the defendants King, &c., within six months from the date of this decree.

Jan. 20th.

### EADES v. HARRIS.

One of several cestui que trusts having taken the benefit of the Insolvent Act, joins as a co-plaintiff with two others of the cestui que trusts in a bill to carry the

JOHN EADES, who carried on an extensive business as a brick-maker in Staffordshire, having died leaving a very obscure will, his widow and children, in order to prevent disputes as to the testator's property, executed certain indentures of lease and release and assignment, whereby all the testator's freehold, copyhold, and customary estates,

trust deed into execution; the assignee of the insolvent being a defendant, and the bill alleging that there is a surplus coming to the insolvent after payment of all his debts. This is not a misjoinder of which advantage can be taken at the hearing; and semble that it is no ground of demurrer.

With respect to the effect which such assignments have upon the suit, there is no distinction between assignments pendente lite of equitable interests by plaintiffs, and similar assignments by defendants.

Inquiry directed as to defendants being out of the jurisdiction.

. Juin . 516

and all his stock in trade and personal effects, were conveyed and assigned to three persons of the names of Pearce, Harris, and Robinson (who executed the deed), their heirs, executors, administrators, and assigns, upon trust to sell the same, and, after paying the testator's debts, to invest the produce in the funds, or on real security, and pay the dividends and interest to the testator's widow for her life, and after her death, to divide the property among such of the testator's children as should be then living, and the issue of such as should be dead. Power was given to the trustees to permit the widow to carry on the testator's business for the support of such of the children as might be under age.

The bill was filed by three of the testator's children, alleging misapplication of the trust-funds by the trustees, and praying for accounts of the real and personal estate, whether sold or unsold by the trustees, and that the rights of the parties might be declared.

The plaintiffs in the suit were Thomas Eades, the eldest son and heir-at-law of the testator, John Eades, another son, who was his customary heir, and George Dalrymple, and Elizabeth, his wife; Elizabeth being a daughter of the testator. The last named plaintiffs were out of the jurisdiction. The defendants were the trustees, the widow, the remaining children of the testator, including Sarah, the wife of William Bannister, and her husband, (who were alleged to be out of the jurisdiction), and James Higgs, the assignee of Thomas Eades under the Insolvent Act.

The bill alleged, that the real and personal estate of Thomas Eades had been conveyed to the defendant Higgs, upon the trusts of the several acts of Parliament passed for the relief of insolvent debtors, under which there was a resulting trust for the benefit of the said Thomas Eades beyond the debts thereby secured, which debts such real and personal estate were more than sufficient to satisfy; and that this would appear from the accounts of the as-

EADES 9. EADES

v.

HARRIS.

signee. The prayer against the assignee was, that he might be directed to pass his accounts in the proper court, and pay over to the plaintiff, Thomas Eades, the surplus of his property, after payment of his debts.

No evidence was entered into on either side, but the answers were replied to.

On behalf of the defendants, the trustees, it was objected, partly in their answers and partly at the hearing:—
1. That Thomas Eades, being an insolvent debtor, was not competent to join as a plaintiff, although his assignee was a defendant. 2. That John Eades had, since the institution of the suit, taken the benefit of the Insolvent Debtors' Act, and that his assignee, Thomas Harris, claimed his share in the premises. 3. That the defendants, Bannister and wife, who had put in no answer, were not proved to be out of the jurisdiction.

Mr. Cooper, and Mr. Jeremy, for the plaintiffs.—First, there being alleged to be a surplus of Thomas Eades' property, in respect of which the bill is brought, he is not an improper or unnecessary party; but even if he were an unnecessary party by reason of want of interest, the objection on that ground would not be available at the hearing. Raffety v. King (a). Secondly, though it is alleged by the answers of the trustees, that John Eades has taken the benefit of the insolvent act, that allegation is denied by the plaintiff, John Eades; though it may be true that since the institution of the suit, he has assigned his interest. John Eades, therefore, having replied to the answer, is entitled to an inquiry on that point. In order to meet the third objection, the plaintiffs are entitled to exhibit an interrogatory.

Mr. Koe and Mr. Romilly, for the defendants, the trus-

<sup>(</sup>a) 1 Keen, 601. See the judgment of Alderson, B., in Davies v. Quarterman, 4 You. & C. 257.

tees.—The defendants are willing to account, but desirous to account to proper parties. Thomas Eades cannot sue as a co-plaintiff, notwithstanding he has made his assignee a defendant: Kaye v. Fosbrooke (a). [The Vice-Chancellor.-The only plaintiff in that case was the insolvent.] Here, he joins with other parties as a co-plaintiff, but that will not help the difficulty. He is, to say the least, an unnecessary party. King of Spain v. Machado (b). [The Vice-Chancellor.—In Rhodes v. Warburton (c), there was a superfluous plaintiff, but The Vice-Chancellor held, that a demurrer would not lie on that ground. The party was not a stranger, but had an interest. That case went before Lord Cottenham; the same objection was taken, and he confirmed the decision.] Admitting that Thomas Eades might sue as a co-plaintiff, he is virtually the sole plaintiff in this case, John Eades having assigned his interest for the benefit of his creditors, and the other plaintiffs being out of the jurisdiction. Under such circumstances it is submitted, that the defendants ought to be protected by having the assignee of John before the Court; more especially as another suit has been filed against them by the testator's creditors. [The Vice-Chancellor. - John's assignment is merely that of an equitable interest pendente lite.] submitted, that there is a distinction in this respect between plaintiffs and defendants. The Court will not allow a defendant to stave off the consequences of a cause, by assigning from time to time, and therefore takes no notice of his assignment. But the same reason does not apply to There are other cases, as that of the marriage of females, in which the same acts done by plaintiffs and defendants have a very different effect on the suit.

Mr. Craig, Mr. Jervis, and Mr. Law appeared for other parties.

(a) 8 Sim. 28.

(b) 4 Russ. 225.

(c) 6 Sim. 617.

EADES v. HARRIS. EADES

7.
HARRIS.

The Vice-Chancellor.—The plaintiffs, Mr. and Mrs. Dalrymple, are necessary parties, having plainly a right to sue; and the circumstance that they are out of the jurisdiction is not material. It is not a question of directing or not directing security for costs. They are properly made plaintiffs. They happen to be associated with Thomas Thomas had an interest which was and John Eades. drawn out of him, to an extent but not wholly, before the institution of the suit, having taken the benefit of the Insolvent Debtors' Act; and it is alleged that the suit must now fail because he is joined as plaintiff. It appears to me, having regard to the nature of the bill, the presence of his assignee, the advanced stage of the cause, and the association of the co-plaintiffs, that this is not an objection sufficient to prevent the Court from making a decree. How it may affect the question of costs is not now to be That is matter for future consideration. As to decided. John Eades, he appears not to have taken the benefit of the Insolvent Act, and not to have become bankrupt: but it seems that after the suit had been commenced he executed a private deed of assignment for the benefit of his creditors. I have looked at the will, and the deed; it does not appear to me that he had any legal interest: and I apprehend that the circumstance of one of several plaintiffs executing after the institution of the suit an instrument which merely affects that plaintiff's equitable interest does not prevent the suit from being heard, but that it may be heard as if there had been no such assignment: and that those who claim under it must take such course to enforce their rights as they may be advised.

The only other point in question relates to Mr. and Mrs. Bannister. As they are alleged to be out of the jurisdiction an inquiry must be directed as to that fact.

His Honor then directed other necessary inquiries, and accounts.

After the case had been disposed of, the Vice-Chancellor said that he did not recollect the distinction to have been before taken between assignments pendente lite of equitable interests by defendants, and similar assignments by plaintiffs; and he called upon the counsel before the bar to mention some authority on the subject. The cases of Small v. Attwood (a), De Minckwitz v. Udney (b), and Turner v. Robinson (c), were then mentioned as bearing on the point; but it seemed to be admitted that no authority existed for the distinction.

1842. EADES HARRIS.

(a) 1 You. & C. 39.

(b) 16 Ves. 466.

(c) 1 S. & S. 3.

### MAY v. SELBY.

OHN BOSANQUET POLHILL by his will devised A trustee may a messuage, called Saint Vincents, with the appurtenances, to Walter Barton May and James Selby, and their heirs, upon trust to sell, with power to give receipts, &c., and to place out the money arising from the sale in government trusts parties; securities, and pay the dividends to the testator's wife, Elizabeth, for her life; and after her death to pay, assign, and transfer the trust monies unto all the children of the testator, who should be living at his decease, in equal shares; but if there should be no such children, to pay, assign, and transfer such trust monies unto all the children of the testator's sister, Sarah, the wife of William Douthwaite, in equal shares. And the testator gave power to those Orders is his trustees to delay the sale, in case his wife should wish to occupy the premises.

The testator died in 1825, leaving no children; but there taken at the were four infant children of his sister Sarah living at his death, two of whom, who were daughters, afterwards married.

January 23rd.

file a bill against his co-trustee to recover the trust-fund. without making and where the trust is under a devise of real estate for sale. with power to give receipts, this general rule of pleading is corroborated by the 30th of the Orders of

August, 1841. The 40th of also applicable in such a case where the objection is only hearing.

A bill to affect real assets must be brought by the plaintiff,

on behalf of himself and all other the creditors of the testator.

MAY
v.
SELBY.

In 1827, the property was put up to auction, but afterwards purchased by private contract by a Mr. Schoones for £3000. Of this sum, £2000 were left on mortgage of the premises, and £500 were paid by Schoones to Selby. The remaining sum of £500 was paid as a deposit to Brooks, the auctioneer, but as he had been employed on the responsibility of the widow, and against the advice of Selby, an equivalent was paid to Selby by Schoones out of some money which Schoones owed the widow for furniture, the widow taking the risque of recovering the deposit. Selby therefore received from Schoones £1000.

In 1828, Selby died. In 1829, Brooks became a bankrupt, whereby the £500 deposit was lost. And in 1831, the testator's widow married Sir William Twisden, having previously by a settlement, dated the 22nd March of that year, assigned all her property to May, the surviving trustee under the testator's will, and George Claridge, in trust for her separate use, without power of anticipation.

The bill, which was filed by May against the heir at law and the personal representative of Selby, and against Sir William and Lady Twisden, and Claridge, after stating the foregoing facts, and alleging that Selby was a trader within the meaning of the bankrupt laws, prayed that the plaintiff, as surviving trustee under the will, might be paid the sum of £1000 so due and owing by Selby out of his estate, or in case assets were not admitted for that purpose, that the usual accounts might be taken of his personal estate, and if necessary, that his real estate might be sold, &c. But in case the Court should be of opinion that Selby's estate was not liable to pay that part of the £1000 which arose from the sale of the furniture, then, that such part might be paid by Sir William Twisden, or out of the separate estate of Lady Twisden, the plaintiff retaining the dividends of her estate for that purpose; and that the several liabilities of all parties in respect of the £1000 might be settled and declared.

The cause now came on for hearing.

1842. May

SELRY.

The case having been opened for the plaintiff, Mr. Russell, for the personal representative and heir-at-law of Selby, objected that the children of Mrs. Douthwaite ought to have been made parties to the suit, as otherwise, each of them might, on a future occasion, file a bill against the defendants whom he represented, praying the same relief as was prayed by this bill. He also contended, that, as the bill sought relief against the real estate of Selby, it ought to have been brought by the plaintiff on behalf of himself and all other the creditors of Selby (a).

Mr. Swanston and Mr. Bazalgette, for the plaintiff.—The statement in the bill of the names of the children of Mrs. Douthwaite is mere surplusage. In a suit by one accounting party against another, or by a surviving trustee against the representative of a deceased trustee for the restoration of the trust fund, it is not necessary to make the cestui que trusts parties: Franco v. Franco (b). Independently of the principle of that case, the frame of the bill is sufficient under the 30th of Lord Cottenham's Orders; and at all events. as the objection has not been taken by the answer, the Court may deal with the case under the 40th of those Orders. Sir William and Lady Twisden are made parties in respect of the auxiliary relief prayed by the bill. As to the heir-at-law of Selby, it may be conceded, that the suit in its present shape cannot be sustained against him. The plaintiff, therefore, is willing that as against him the bill should be dismissed.

# Mr. Heathfield, for Sir William Twisden.

VOL. I.

R

N. C. C.

<sup>(</sup>a) See Johnson v. Compton, 4 (b) 3 Ves. 75. See Dan. Ch. Sim. 47. Pr. Vol. I. p. 313.

MAY
v.
SELBY.

Mr. Shebbeare, for the defendant, Lady Twisden.

Mr. Freeling, for the defendant, Claridge.

Mr. Russell, in reply, contended that in Franco v. Franco the contract was special, and gave a right to one trustee to proceed personally against the other, without joining the cestui que trusts. But admitting that the bill in that case was sustainable on the general ground contended for, here the object of the bill was not merely to obtain possession of the trust fund, inasmuch as the prayer extended to a declaration of the liabilities of the parties.

THE VICE-CHANCELLOR.—The case of Franco v. Franco decided that where one trustee had concurred with another in a breach of trust committed for the benefit of the latter, under a contract between them that the latter should indemnify the former, a bill might be filed by the trustee who concurred against his co-trustee, without the presence of the cestui que trusts; yet no man can deny that the defendant in that case was liable to another suit at their instance. Having regard to that decision, and considering the object to which this suit is admitted at the bar by the counsel for the plaintiff to be now limited, considering also the orders of Lord Cottenham to which reference has been made, I am of opinion that the suit may go on. But the bill must be dismissed as against the heir-at-law of Selby, with costs, by consent of the plaintiff; and it must be entered in the decree that the plaintiff waives all personal demand against Sir William Twisden, and also all demand against the estate of Selby, except for sums actually received by him. And then let the plaintiff take the usual creditors' decree against the personal estate of Selby.

Mr. Heathfield then, on the part of his client Sir William Twisden, submitted that the suit should be dismissed as against him, as he had admitted nothing, and nothing had been proved against him.

MAY
v.
SELEY.

THE VICE-CHANCELLOR.—His present position is the result of having married a lady having separate estate. She has a right to conduct the suit relating to her separate estate as she may think fit; and being her husband he must remain before the Court.

JOHN and EDWARD MASON, Plaintiffs; and GEORGE FRANKLIN and THOMAS CLEAVE, Defendants.

Jan. 23rd.

THE bill was filed by the plaintiffs against the defendants, devisees in trust for sale under the will of Edmund Collins, for the specific performance of a contract by the latter to sell the plaintiffs lot 5 of a property situate at New Windsor, near the river Thames, which had been sold by auction in lots, and of which lots 1, 2, and 5 had been purchased by the plaintiffs. The complaint was, that although a certain piece of land was, according to the printed particulars of sale included in lot 5, yet the defendants refused to execute to the plaintiffs a conveyance which included that piece of land.

The defendants by their answer stated, that by an arrangement made publicly at the sale, at which the plaintiff John Mason and a Mr. Secker, who then acted as his solicitor, were present, it was settled expressly, and in a manner which John Mason must have perfectly understood, that the piece of land in question should belong to and be included in lot 4, subject to a right of way leading to chasers of lot bot 5; that this alteration was, with the consent of all parties present, and particularly Secker, noted in writing on the plan of the premises which was exhibited at the

A bill brought by a purchaser for the specific performance of an agreement to sell lot A. as described in the particulars of sale, was resisted by the vendors on the ground (stated in their answer) that by an arrangement, to which the plaintiff was a party, part of lot A., as described. was deducted from that lot and added to lot B .: - Held, that the plaintiff, on amending his bill and putting in issue this averment, was bound to make the purchasers of lot the suit.

MASON 9.
FRANKLIN.

auction; and that the plan so altered was publicly referred to by the auctioneer in selling the lots.

The defendants proceeded to state that, after the sale of lot 4, lot 5 was put up for sale, and the plaintiff John Mason was the highest bidder and declared the purchaser thereof, on behalf of himself and the other plaintiff. And the defendants admitted that, after the sale, the plaintiff John Mason, acting for himself and the other plaintiff, paid his deposit and signed a memorandum in writing of the sale, which was endorsed on the printed particulars; that the auctioneer also signed this memorandum as agent for the defendants, but that he inadvertently omitted to write upon it any note or remark as to what passed at the sale relative to the piece of land in question.

It was not stated in the answer, nor did it in any manner appear, whether the contract with Messrs. Jennings was signed before the contract with the plaintiffs.

This answer having been put in, the plaintiffs amended their bill by putting in issue the facts alleged by the answer, but without making Messrs. Jennings defendants. This omission was noticed in a general manner, but not in the shape of a formal objection, in the answer to the amended bill.

On the cause coming on for hearing,

MASON 2. FRANKLIN.

Mr. Anderdon and Mr. Wright, for the defendants, objected to the omission of W. and J. Jennings as defendants to the suit.

Mr. Wigram and Mr. Lloyd, for the plaintiffs, cited Mole v. Smith (a), Tasker v. Small (b), and Wood v. White (c); and contended that if the Jennings' had been made defendants, they might have demurred to the bill. That, though the Jennings' might claim an interest in lot 5, and even a better title thereto than the plaintiffs, yet as there was no privity of contract between them and the plaintiffs, the latter had no equity against them.

THE VICE-CHANCELLOB.—I think that the general rule is as has been stated—that you cannot raise a question of adverse collateral facts on a bill for specific performance. The question is, whether the rule applies to a case circumstanced like the present, which is the case of a bill brought by purchasers at an auction for the specific performance of an agreement entered into with the vendors, who are trustees for sale, to purchase a certain let called lot 5, according to a certain alleged description of its contents. The defence is, that, by reason of an arrangement which took place at the sale, a piece of land which is the subject in dispute, and which is claimed by the plaintiffs as belonging to their lot, was attributed to the lot sold immediately before that lot, namely lot 4; and therefore, that they the defendants entered into a contract for sale of the fourth lot, as altered by this addition, to Jennings. It is contended for the plaintiffs, that the purchasers of the 5th lot

<sup>(</sup>a) Jac. 490. (b) 6 Sim. 625; 3 Myl. & Cr. 63. (c) 4 Myl. & Cr. 460.

1842. Mason v. Franklin. have a right to file a bill for specific performance against the present defendants alone, leaving them exposed to another suit by Jennings. I think it would be improper, under the circumstances of this case, to leave them so exposed. Admitting the general rule, I do not think it applies to this description of case. I may, however, say, that having regard to this defence, and to the case which a plaintiff in a bill for specific performance is bound to make out unless the evidence for the defendant wholly fails, it would be a strong thing to dismiss the bill under such circumstances. The plaintiffs, therefore, must have liberty to amend by adding parties.

Mr. Anderdon, for the defendants, then asked for the costs of the day, observing that in The Attorney-General v. Hill (a) the Court gave such costs, though the objection was not taken by the answer. Here the objection was not taken in precise terms, but it was noticed by the answer.

THE VICE-CHANCELLOR said he would assume that the objection was taken by the answer in the strongest and most pointed manner. He nevertheless thought that this was a case in which such costs should be reserved (b).

Mr. Lloyd then applied for liberty to add allegations applicable to the case of the proposed new parties being brought before the Court, observing that this was not included in the liberty granted to amend by adding parties (c).

THE VICE-CHANCELLOR acceded to the application.

<sup>(</sup>a) 3 Myl. & Cr. 247.

in the Court of Exchequer. Craw-

<sup>(</sup>b) See 4 Y. & C. 18.

forth v. Holder, in Excheq. Jan.

<sup>(</sup>c) The practice was otherwise 1840.

1842.

January 26th, 27th.

1 Ph. 402

Between The Rev. WILLIAM OLIVER, Clerk, Plaintiff; and James Latham, Isaac Aston and Others, and John FOSTER and Others, Defendants.

BILL by the plaintiff, as perpetual curate of the parish and parish church of Barlaston, in the county of Stafford, against the defendants, as occupiers within that parish. claiming by endowment, prescription, usage, or some other lawful ways and means, to be entitled to the tithes of hay, milk, calves, and agistment within the parish, and praying an account and satisfaction of those tithes.

The defendant Isaac Aston, by his answer, stated that he was tenant to the plaintiff of the glebe land within the parish, but that no tithe had ever been demanded of him of the produce of such glebe, and that he did not conceive that he was bound by his agreement with the plaintiff to pay tithes; and he submitted that whatever might be the plaintiff's title to other tithes, he had no claim against the defendant for tithes of the glebe.

The general defence of all the defendants, with such variations only as applied exclusively or more particularly to their respective occupations, was in substance as follows:--

That the plaintiff, whose title as licensed curate, though not as perpetual curate, the defendants admitted, was not, as such curate, entitled to the tithes prayed for by the bill: and that whatever tithes had been paid in kind or rected to try

On a bill filed by a perpetual curate against occupiers for the tithes of hay and certain small tithes, it appeared probable from the evidence that, previous to the year 1715, the curate only received the tithes by per-mission of the lay impropriator : but, it was proved, that since that period he had. to a certain extent, received tithes, or a compensation for tithes, and that no tithes of any description had ever been demanded by, or paid to the impropriator:—
Held, that the curate's title to tithes was established, but issues were dithe existence of certain mo-

duses, set up by the defendants. To a bill for the tithes of hay within a certain parish, it was averred by the answer, that there is within the said parish a piece of land called D., and that by a good and laudable custom, observed within the said parish, from time whereof the memory of man is not to the contrary, the said piece of land called D. hath been, and is, and of right ought to be enjoyed by the impropriate rector of the said parish, or other owner for the time being of the tithes of hay of certain lands within the said parish, in lieu and full satisfaction of and for the tithes of hay of such last-mentioned lands:—*Held*, that this modus was well pleaded as a custom within the parish, and that the expression, "or other owner," did not render it bad for uncertainty.

In a suit, by a vicar or perpetual curate, against occupiers for tithes, the evidence of a landowner within the same parish is not admissible on behalf of the defendants.

OLIVER v.

compounded for to the plaintiff, did not belong to him as perpetual curate of Barlaston, and ought not to have been set out and rendered to him, except as thereinafter mentioned. That the impropriate rector of Barlaston was formerly, and down to a period long subsequent to the general dissolution of monasteries, owner of, and entitled to, and in the possession and enjoyment of all the glebe lands, and all the tithes, both great and small, belonging to the parish church of Barlaston. That no deed or instrument was in existence, by which the impropriate rector had given the same, or any part thereof, to the curate of the said parish, or endowed him with the same, or any part thereof; and that there was no evidence that any such endowment, deed, or instrument ever existed. That all such glebe lands and tithes still of right belonged to the impropriate rector of the said parish. That the curate of the said parish had been for many years past in the possession or enjoyment of certain glebe lands and also certain tithes, or moduses, or compositions in lieu of tithes belonging to the said parish church; but that such possession or enjoyment had been by the sufferance only of the impropriate rector of the said parish.

With respect to hay, the defendants admitted that tithes of hay in kind, or compositions to the full value thereof, had been paid, and were payable of certain lands within the parish, and that certain moduses, or customary payments in money had been paid, and were payable, in lieu of the tithes of hay of certain other lands within the parish. These formed two classes of land. They then averred, "that within the said parish, there is a certain piece of land, called or known by the name of Dustilow Dole, containing &c., and that by a good and laudable custom, observed within the said parish, from time whereof the memory of man is not to the contrary, the said piece of land, called Dustilow Dole, hath been, and is, and of right ought to be enjoyed by the impropriate rector of the said parish, or

other owner for the time being of the tithes of hay of certain other lands within the said parish, in lieu and full satisfaction of and for the tithes of hay of such last-mentioned lands." These formed a third class. As to a fourth class of lands within the parish, they set up a similar modus, by the enjoyment by the impropriate rector or other owner, &c., of a meadow in the parish called Priest's Meadow.

OLIVER 7. LATHAM.

The several classes of lands were separately scheduled; and it was admitted that the curate had been for many years, though by sufferance only of the impropriate rector, in the enjoyment of the several tithes and moduses payable in respect of the scheduled lands, including the possession and enjoyment of Dustilow Dole and Priest's Meadow.

In the map attached to the answers, the first class of lands was not coloured, the second class coloured brown, the third yellow, and the fourth red.

As to the tithes of milk and calves, the defendants set up the following modus:—"That every occupier of land within the said parish for the time being, having or keeping a milch cow or cows upon his lands, hath, and of right ought at Easter, in each year, or so soon after as demanded, to pay to the impropriate rector of the said parish, or other owner for the time being of the tithes of milk and calves of the said parish, the sum of  $1\frac{1}{2}d$ . for every cow yielding milk or calf so kept by him upon his said lands within the year, when the number of cows kept by him was less than ten within the year, and the sum of 2d. for every such cow so kept by him upon his said lands, when the number equalled or exceeded ten within the year."

As to agistment, the defendants set up, in similar terms, a modus of 1d. for each barren and unprofitable cow kept within the lands of the occupier within the year.

The defendants submitted by their answer, that the impropriate rector, the Duke of Sutherland, ought to be a party to the suit; but this objection was waived at the hearing.

The cause now came on for hearing.

OLIVER D. LATHAN.

The documentary evidence for the plaintiff consisted of the decree, dated the 7th January, 1839, and proceedings in a cause of "Oliver v. Adderley," in which the plaintiff filed his bill against other occupiers in the parish for the tithes of hay, and various small tithes, and obtained a decree for an account of the tithes of hay, milk, calves, wool, lambs, pigs, geese and agistment (a).—The nominations of the following persons to the perpetual curacy of Barlaston: viz., John Lovat, August 22nd, 1760, by Francis, Earl Gower; Benjamin Adams, (on the death of Lovat), July 22nd, 1792, by the Marquis of Stafford; and the plaintiff, (on the death of Adams), March 1st, 1834, by George Granville, Duke of Sutherland.—A terrier, dated 1616, signed by the minister, churchwardens, and other parishioners, which, after enumerating the "vicarage" buildings and glebe lands, stated as follows:--" Item, all the tythes usual and accustomed within the parish."—A terrier of 1682.

The parol evidence for the plaintiff was very slight; but the depositions of witnesses in "Oliver v. Adderley," relating to the perception of several species of tithes comprised in that suit, were read. Upon the plaintiff's counsel tendering in evidence depositions as to the perception of the tithes of pigs, geese, &c.—

The defendants' counsel objected to the admission of this evidence, on the ground that such tithes were not prayed for by the bill.

On the other hand it was observed, that the defendants, by their answer, alleged that the impropriator was entitled to all the tithes.

THE VICE-CHANCELLOR admitted the evidence.

The defendants' documentary evidence consisted of the

(a) In this suit the plaintiff's title was not put in issue.

Ecclesiastical Survey, (to shew that the Prior of Trentham was entitled to the rectory and chapelry of Barlaston, and the tithes belonging to both; the latter including, nominatim, the tithes of wool, lamb, grass, hav, and white tithes).— A lease of the priory, 26 Henry 8.—Minister's accounts, on the suppression of the monasteries, (27 & 28 Hen. 8).— Grant of 80th Hen. 8, of the priory and rectory of Trentham, with the tithes, &c., to Charles Brandon, Duke of Suffolk.—Conveyances from him in the same year to Pope and wife; and from them in 31st Hen. 8, to James Leveson, the ancestor of the Duke of Sutherland,-Various indentures of settlement, chirographs of fines, &c., from 8 Jac. 1, to 1711, (to shew that the tithes of Barlaston remained in the Leveson family, and were the subject of settlement, and could not have been granted away).-Act of Parliament, 1711, comprising all the estates and tithes. Exemplification of recovery, 1711, of the estates of Trentham and Barlaston, with the advowson, tithes, &c. -Rentals, from 1606 to 1702, (to shew that rent was paid to the Levesons for the tithes of Barlaston, such rent being always of the same amount, 40s., and the same as originally reserved in the priory lease; and no rent expressed to be paid by the curate).—Terriers, beginning with a terrier of 1676, in which mention is first made of Priest's Meadow and Dustilow Dole—the former being described as "one little meadow, called Priest's Meadow, which freeth twelve acres in the parish paying tithe hav."-Terriers, 1682, 1685, 1698, of the vicarage and glebe lands of Barlaston, including Dustilow and the Priest's Meadow. - Terrier, 1698, of the buildings, lands, tithes, dues, and other profits belonging to the curate of Barlaston, describing certain parts of the parish as paying tithe hay in kind, and others as exempted by Priest's Meadow and Dustilow Dole, "for which," viz. Dustilow Dole, "the incumbent receives 13s. 4d." This terrier mentioned agistment tithe, as due from out-parishioners, customary payments for seveOLIVER

U.

LATHAM.

OLIVER 8. LATHAM. ral small tithes, and moduses for calves. Signed by Bassett, the curate, and churchwardens, &c.-Terrier, 1701, much to the same effect as the preceding, and signed by the same curate, but containing a protest by the curate against the exemption by Dustilow Dole, and the modus of 13s. 4d. To this terrier was subjoined a note, (which was repeated nearly in the same terms in the two subsequent terriers), in these terms:-"All which aforesaid houses, lands, tithes, and dues belong to the incumbent when he is nominated, and the said profits are given to him by the patron of our church, who is the worshipful Sir John Leveson Gower, of Trentham, Bart."-Terrier, 1705, in which the same curate contradicts his former protest, and states the 13s. 4d. modus to be correct, and that Dustilow Dole itself never belonged to the incumbent.—Terriers, 1711 and 1714, signed by the same curate, in which Dustilow Dole is itself treated as the modus.—Terrier, 1828, signed by Adams, the curate, in which the modus of 13s. 4d. is again mentioned.

The terriers, commencing with that of 1698, mentioned that there was due to the incumbent, what the law allows for beasts and sheep laid within the parish. Mention was also made in some of the terriers of moduses for calves, but the statements on this point were inconsistent.

The defendants produced the parol evidence of several witnesses with a view to prove the moduses; but the payments were invariably shewn to have been made to the incumbent. In support of the moduses the defendants proposed to read the evidence of John Aston, a land-owner within the parish. This witness was not a defendant to the present suit, but had been a defendant in "Oliver v. Adderley". The evidence, however, was rejected.

The cause then proceeded on the merits.

Mr. Spence and Mr. William Eagle, for the plaintiffs .--

The proceedings and decree in "Oliver v. Adderley," are evidence of the plaintiff's title as perpetual curate; his right to sue in that character having been admitted by the defendants in that suit. Now, the right of a perpetual curate to tithes, arises only by endowment or usage. Where you rely on endowment, it is not necessary to produce the original instrument of endowment; you may produce other documents. Now here, we rely on the terrier of 1616, which gives the plaintiff all the accustomed tithes within the parish. The failure or omission to prove perception of the tithes of every individual article is immaterial. Proof of perception of the tithes of some articles will give the right to the tithes of the whole class, where no other party has dealt with the tithes of that class: Kennicott v. Watson (a); Curliffe  $\forall$ . Taylor (b); Manby  $\forall$ . Lodge (c); Byam  $\forall$ . Booth (d); Williamson v. Thompson (e). We prove perception of the tithes of hay, and of geese, eggs, and pigs; and there has been no payment of those tithes to any other person.

If the plaintiff's case be considered to rest on usage, his title, like that of a vicar, may be established by proof of modern usage: Jackson v. Walker (f); Parsons v. Bellamy (g). In the case of a vicar, the usage of a very few years is sufficient to support a presumption of endowment; and though it is usual, where a party claims by prescription or usage, to prove his possession by the evidence of old witnesses, yet here the defendants themselves, by their mode of pleading, have precluded the necessity of going into such evidence.

As to the moduses, the pleading is ill in several particulars. Here, the averment that the tithes are payable to

OLIVER U. LATHAM.

<sup>(</sup>a) 2 Price, 250; 2 E. & Y. 690.

<sup>(</sup>b) 2 Price, 329; 3 E. & Y. 743.

<sup>(</sup>e) 9 Price, 231; 3 E. & Y. 1052.

<sup>(</sup>d) 2 Price, 231; 3 E. & Y.716.

<sup>(</sup>e) 9 Price, 186; 3 E. & Y.

<sup>1046.</sup> (f) 3 Gwill. 1231; 3 E. & Y.

<sup>|302.</sup> 

<sup>(</sup>g) 4 Price, 190; 3 E.& Y. 832.

OLIVER

the impropriate rector, "or other owner for the time being of the tithes," is so framed, in order to avoid conceding to the plaintiff the title to the tithes. But the general rule of law is, that the party pleading the modus admits the title of the party to whom the modus is alleged to be payable; therefore, this averment is wrong. [The Vice-Chancellor.-What authority have you for that general proposition?] The case de Modo Decimandi (a); Whieldon v. Harvey (b). [The Vice-Chancellor.-I do not think those cases support the proposition. I am not prepared to say. that the proposition applies even to a plaintiff setting up a modus; it certainly, I think, does not apply to a defendant pleading a modus. Can you go the length of contending, that, if a vicar sues an occupier, and the occupier claims a modus, but is disposed to dispute the vicar's endowment, he is precluded from so doing?] We will search for other authorities on the point (c). Another instance of bad pleading is that as to the possession of Dustilow Dole, which is pleaded as a custom, with a view to let in evidence of reputation; whereas it is a mere private right.

Mr. Boteler, Mr. Simphinson, Mr. Lowondes, and Mr. E.P. Smith, for the defendants.—The documentary evidence, particularly that of the rentals and terriers, shews most distinctly that the title to the tithes at the time of the dates of those documents was in the ancestors of the Duke of Sutherland, as impropriate rectors of the parish, and that the curate only received the tithes by permission of the impropriator. Any presumption, therefore, of endowment which might otherwise arise is at an end. The plaintiff, however, files his bill in the character of perpetual curate; and therefore as one in whose favour the law will make no presumption of

<sup>(</sup>a) 13 Rep. 37; 1 E. & Y. 183.

<sup>1248;</sup> and Carte v. Ball, 3 Atk.

<sup>(</sup>b) Gwill. 950; 2 E. & Y. 60.

<sup>496; 2</sup> E. & Y. 103, were men-

<sup>(</sup>c) On the following day, Travis

tioned.

v. Oxton, Gwill. 1066; 3 E. & Y.

title whatsoever. He is not like a rector or a vicar, for, by the statute of Hen. 4, an impropriator was bound to endow a vicar. The origin of perpetual curacies was this: by the stat. 4 Hen. 4, c. 12, it was enacted, that in every church appropriated there should be a secular person ordained vicar perpetual, canonically instituted and inducted, and convenably endowed by the discretion of the ordinary. But, to follow the words of Burn, in his Ecclesiastical Law, "If the benefice was given ad mensam monachorum, and so not appropriated in the common form, but granted by way of union pleno jure, in that case it was served by a temporary curate belonging to their own house, and sent out as occasion required. The like liberty of not appointing a perpetual vicar was sometimes granted by dispensation, in benefices not annexed to their tables, in consideration of the poverty of the house or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred (after the dissolution of the religious houses) from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who, by consequence, were obliged to nominate some particular person to the ordinary for his license to serve the cure, the curates by this means became so far perpetual as not to be wholly at the pleasure of the impropriator, nor removable but by due revocation of the license of the ordinary" (a). All, therefore, that was required was, that the impropriator should appoint a fit and proper person to the office of curate—not a word about stipend, salary, or other payment, the whole being left in the discretion of the rector. And it is so laid down in Bonsey v. Lee (b). It is, therefore, clear that a curate such as the plaintiff asserts himself to be can have no right whatever, unless he can shew that he has an endowment. It is even extremely doubtful whether a party

OLIVER

<sup>(</sup>a) Burn. Eccl. Law, Vol. 2, p. 55.

OLIVER 5.
LATHAM.

so circumstanced can receive, by way of endowment, independent of statute, any payment so as to vest the same in him and his successors. We have already proved that the curate in this case is appointed and removable at the will and pleasure of the impropriate rector, unless duly licensed. It is, therefore, clear that he can take nothing in the shape of legal interest, which would go to his successors. deed, before the 17 Car. 2, c. 3, no such perpetual curate could have had the tithes here claimed; for, by the 7th section of that act it is enacted, that, in certain cases, lands and tithes may be vested in perpetual curates and their successors. Without denying that the curate of Barlaston might have been endowed under 17 Car. 2, c. 3, it is sufficient to shew that no such endowment has been proved. The endowment could not have been before the date of that act, which was passed in 1666; but the endowment insisted on by the plaintiff is by virtue of the terrier of 1616, a date prior by fifty years to the statute first giving any power for such endowment. Moreover, although such a terrier may be evidence of a custom, and be adduced to shew an endowment, vet it cannot be held in itself to have created an endowment.

Mr. Spence, in reply, was directed to confine his argument to the question, whether and to what extent the plaintiff was entitled to the tithe of hay, and whether he was entitled to the other tithes without issues as to the moduses. He then contended, that it was clear that the curate for the time being had had the tithe of hay or a composition for such tithe for many years, and that such perception was a proof of endowment: Dent v. Rob (a). He further urged that the Ecclesiastical Survey of Hen. 8, which had been put in by the defendants themselves, shewed that the tithe of hay was then paid; and that the

alleged substitution of Dustilow Dole and Priest's Meadow for the tithe of hay on certain lands could not have taken place consistently with all the lands having been the subject of settlement. He also commented on the variance between the agistment modus as laid and the statements in the terriers on that subject. OLIVER 9. LATHAM.

By consent the bill was dismissed without costs as to the claim for the tithes of the glebe lands.

THE VICE-CHANCELLOR.—This is a case of considerable complication, but the Court has received so much valuable assistance from the bar and has had so many opportunities of inspecting the documentary evidence as it was presented, that I do not feel it necessary to delay the statement of my opinion as at present formed.

The only tithes in question in this cause are the tithes of hay, milk, calves, and agistment. A modus is set up with respect to all, except with respect to a portion of the land not coloured in the map, in respect of which hay is sought. The title of the vicar is also denied. I have already stated my opinion to be, and I repeat it, that the denying of the vicar's title, and the laying of the moduses as they are laid, at the same time and in the same pleading, is a course of proceeding competent to the defendants. First of all, with regard to the vicar's title, which is a matter for consideration entirely distinct from the question of the moduses. This rectory has been in lay hands from the time of Henry the 8th. There is no vicarage; the ecclesiastical functions are performed by a perpetual curate, and I have no doubt that for more than two centuries past the term perpetual curate has been a term legally and properly applied to the incumbent for the time being. It appears established by the evidence, that, for considerably more than a century at least, no tithe of either of the descriptions sought by this bill, nor any compensation or

OLIVER

O.

LATHAM.

payment in respect of either of those descriptions of tithes, has ever been received or has ever been demanded by the impropriate rector, that impropriate rector being a layman, resident in the immediate neighbourhood-a fact not unimportant in a case of the present description. Upon the issue joined between the parties, it is manifest that for more than a century past, whatever compensation has been paid in respect of the tithes in question, it has been paid to the curate or enjoyed by him, and that, as I have already said, in the immediate neighbourhood—and it may be almost said under the personal observation of the lay rector and his agents. Now, the perpetual curate of this parish for the time being has been a corporation sole for the purpose of acquiring and holding property of this description for certainly more than a century past: during what length of time such a corporation has existed it is needless for the present purpose to inquire, but for more than a century past undoubtedly there has been such a corporation in the parish, now represented by the present plaintiff.

Under these circumstances, the enjoyment of the tithes having been such as I have stated, I find, upon examination and consideration of the evidence, that it is impossible to entertain any very serious doubt that, as between the present plaintiff and the present defendants, the title must be considered as established. It is said against it, and in favour of the title of the impropriate rector, who has never brought forward his own title, that the title is only permissive and at the will and pleasure of the impropriate rector for the time being. At what period the title to the tithes in question was divested from the impropriate rector, or by endowment or otherwise was vested in the perpetual curate, does not appear. There is some obscurity in the earlier evidence, of which there are portions not unfavourable to the view of the case taken by the defendants to which I have just alluded; but the very latest portion of evidence on that subject, in point of time, is earlier than the year 1715, from which period to the present there is no trace in the evidence of any act or claim on the part of the impropriate rector, or of any act of concession or admission on the part of the curate, which would lead to the inference that the curate enjoyed this property otherwise than in his own right. Whether the terrier of 1714 amounted to an admission that the title was permissive I will not say, but whether it did or not, the perpetual curate who signed that terrier died, as it is admitted, more than a century ago, and since that time there have been three or four incumbencies.

Under these circumstances, therefore, I think that I should be departing from the general principle by which this and all other courts are guided in cases of long enjoyment, and should be doing injustice to the plaintiff in the present case, if I were not to hold that for the purposes of this suit his title to the tithes that he asks is sufficiently established.

The mode of perception is another question. The question of the hay tithe divides itself into three branches, which may be represented by the land not coloured, the land coloured yellow, and the land coloured red. If I am right in the opinion which I have stated on the first branch of the case, there is no effectual defence as to the land uncoloured, because it is admitted that tithes in kind are payable to some person in respect of that land; and I have already stated that, in my opinion, the curate is that person; and therefore, so far as the land coloured white goes, that is, so far as any land occupied by any of these defendants extends, other than what is coloured yellow or red, there must be a decree for hay tithe in kind, that is, compensation for the full value so far as it has not been paid.

With respect to the land coloured yellow and coloured red the evidence is not clear and satisfactory, but having regard to the terriers, especially to that which has been OLIVER

OLIVER V.

admitted by successive curates upon this particular subject, I do not think that such a case is made on the part of the curate as against the evidence on the part of the defendants, as should induce me to decide without further investigation. In respect of this, I think that there is a case demanding further inquiry.

There must, therefore, be an issue with respect to the alleged satisfaction for the lands coloured yellow, by means of the piece of land called Dustilow Dole, in the language of the answer, except that it must not be stated to be made or rendered to the *impropriate* rector or other person entitled for the time being, but to the rector or other person entitled. In other respects I think it will do, taking care to specify the land in the third schedule, and to specify the land in Dustilow Dole with the abuttals which the answer gives, and taking care to lay it as a prescription from time immemorial, binding the defendants strictly to what they allege by their answer.

The same observations will apply mutatis mutandis to Priest's Meadow, which will be the second issue. With respect to the cow and calf modus, I have felt the difficulty suggested as to the question of milk; but considering that there is no trace whatever that the tithe of milk has ever been paid, and considering the extent of evidence with regard to the 11d. and the 2d. for the productive cows, on which I purposely abstain from saying more because I send it to an issue, and the total absence of payment of any milk tithes in kind, or in any other shape than this payment of 11d. and 2d., if it covers it, I am of opinion that an issue ought to go also in the language of the answer with regard to calves and milk, stating it precisely as the answer has stated it. The answer, I think, includes the number of 10, as well as what is above and below 10. It must go in the language of the answer. My original impression was, that a similar issue should go as to the barren cows, but at that time my attention had not been

pointedly called, indeed had not been called at all, to the general statement in the terriers of what non-parishioners were to pay, coupled with the particular language of the terriers and the particular position in those terriers in which this payment of 1d. for a barren cow is stated. That circumstance, coupled with the slight or rather no evidence of reputation on the subject, and coupled with the little evidence which there is of payment of that 1d. induces me to think that I ought not to direct an issue as to that. Therefore, I shall direct an account of the agistment tithe generally. The issues, therefore, will be three; and in directing those issues I shall direct it to be admitted before the jury that if hay tithes are pavable in kind for the vellow land and the red land, or either of them, that they are payable to the curate. I shall direct that to be specifically admitted to the jury; and it must be specifically admitted to the jury also, though that, perhaps, is not necessary or less necessary. that if tithes in kind are payable for milk and calves, they are payable also to the curate. It is less necessary as to the cows and calves than with regard to the hav. shall also direct that, saving all just exceptions, all the dooumentary evidence that has been laid before me shall be laid before the jury. I shall make it a positive direction, that all the documentary evidence before me shall be laid before the jury by the respective parties who have laid it before me, saving just exceptions; so that if any document not in its nature evidence, has inadvertently or otherwise been admitted here, it may not be admitted at law merely because it has been read here. Then, of course, there will be the usual direction as to deceased witnesses. The bill as to the glebe land occupied by the plaintiff's tenant must be dismissed without costs; and the executors, by their consent, must be ordered to pay the £27, or whatever the amount is, and thereupon the bill must be dismissed against them without costs. Then, as between the plaintiff OLIVER D. LATHAM OLIVER U. LATHAM.

and the other defendants, an account of the hay tithe must be taken as to the land not coloured, care being taken to provide for the case that something may have been received. Then an account generally of agistment as against those defendants who have admitted agistment.

The question of costs I reserve, because I think it would be harassing both parties now to determine it.

In all probability the plaintiff will, as usual, have all the costs in respect of those portions of the suit, which may possibly be the whole, in which he shall be found to be right, and which I do not now give him because it will be convenient to dispose of the whole costs together. Either party may have a special jury, but I wish it to be understood that it will be more satisfactory to me, if I am ever to hear of this case again, that it should be tried by a special jury. If I were to direct it, it might raise a difficulty as to a tales, as was the case at Gloucester: I would rather not direct it, but rather leave it to the parties. I think that this is a case which ought to be tried by a special jury.

Feb. 18th.

## ABBEY v. PETCH.

A bill having been filed by a client against the executrix of his solicitor for an account of all dealings and transactions be-

THE bill was filed against the defendant as the sole executrix of Robert Petch, a solicitor, who died in 1839, praying an account of all dealings and transactions between the defendant's testator and the plaintiff, as attorney and

tween the plaintiff and the testator, and for an injunction to restrain an action brought by the defendant against the plaintiff to recover £3000 for money lent to him by the testator, the plaintiff after answer obtained an order for an injunction upon the terms of paying the money into Court. Notwithstanding this order, however, the defendant, under particular circumstances, went to trial and obtained a verdict for the £3000, upon the same evidence substantially as was afterwards used in the suit in equity, and which was satisfactory to this Court. No appeal having been made by the defendant against the order for the injunction:—Held, that, assuming the effect of that order to be, to bring the whole matter into this Court, and, therefore, primd facie, to entitle the plaintiff to an account of the £3000, as well as of all other matters comprised in the suit, yet, taking into consideration the verdict at law and the evidence in equity, the defendant was entitled to have the £3000 deemed an item in the account; such item, under the particular circumstances of the case, bearing interest at the rate of £4 per cent. per annum.

elient, and for an injunction to restrain an action brought by the defendant against the plaintiff to recover £3000, for money alleged to have been lent to him by the testator, and for the delivery up of deeds on which the testator, in his lifetime, claimed a lien. ABBEY
v.
PETCH.

The defendant having put in her answer in time to prevent the issuing of the common injunction, the plaintiff, upon the coming in of the answer, moved for and obtained an injunction to stay proceedings in the action upon payment of the £3000 into Court. The order for the injunction, however, not being obtained till the day of trial, the defendant went to trial, and obtained a verdict for £3000. Further proceedings were then stayed by the injunction.

The cause now came on for hearing.

The defendant by her answer stated, that the testator, shortly previous to his death, dictated certain matters for the guidance of his executors, and, amongst others, a statement, which was put into writing by his daughter, to the effect that the plaintiff was indebted to him in £3000, for which he, the testator, had no security but the plaintiff's title-deeds, and that he also owed him money for business done. The defendant admitted that the testator's books and accounts were very irregularly kept, and that she could give no regular account of what was due for business done; but, as to the £3000, she relied on the evidence of her son, Robert Petch, and other witnesses.

Robert Petch, the son, stated, that from the conversations which he had with the plaintiff, he believed that the plaintiff was indebted to his father in the sum of £3000. He stated particularly, that in August, 1839, after his father's death, he made an application to the plaintiff on behalf of his mother, the defendant, for the payment at the next Lady-day of the sum of £3000, as a debt due to the estate of the testator; that the plaintiff, in reply to this application, said it was all right, and inquired whether

ABBRY v. Petch. the whole of the money or only a part of it would then be wanted, to which the deponent replied, that it would be all wanted, upon which the plaintiff said it would be ready. The deponent also stated his belief, that such sum of £3000 bore interest after the rate of £4 per centum per annum, and he gave the following reasons for his belief:— That, in a conversation which he had with the plaintiff in the month of August, 1839, the plaintiff stated that he had overpaid his interest for the last year; that at a subsequent interview, which took place between the plaintiff, his son, and himself, the plaintiff delivered to the deponent a book, wherein was an entry of an account in his own handwriting, between himself and the testator, in which account the plaintiff had debited himself under the date of the 11th day of October, 1831, £60 for a half-year's interest, and also with the further sum of £60 for a halfyear's interest on the 6th day of April, 1832; that the plaintiff, at the last-mentioned interview, promised to send him a copy of such account; that in the course of the same day, the plaintiff's son brought to the deponent a paper writing, which the deponent believed to be in the son's handwriting, and to be a copy of the book produced to him; and that the deponent some time afterwards referred to the testator's book, and found entered therein several payments by the plaintiff to the testator, in the years 1838 and 1839, purporting to be for interest, amounting to the sum of 1261. 16s. 3d., whereby the deponent concluded, that the plaintiff had overpaid a year's interest by 61. 13s. 3d. The deponent admitted that the plaintiff, at a subsequent period, refused to pay the £3000 unless he was previously informed of the items composing that sum.

Other witnesses, on the part of the defendant, spoke to various sums of money having, at different times, been paid by the plaintiff to the testator by way of interest.

All these witnesses were examined at the trial of the

action in support of the present defendant's case, as plaintiff in the action.

ABBEY

D.

PETCH.

No evidence was entered into in this suit by the plaintiff.

Mr. Simpkinson and Mr. Bichner, for the plaintiff.— There are mutual unsettled accounts between the parties. . It is admitted by the answer, that Petch received certain sums on account of the plaintiff; and though Petch, the son, states that those sums were received for interest, yet it is not clear from the evidence of the other witnesses, on what account those sums were received. The plaintiff, therefore, is entitled to an account of the £3000, as well as the other matters. The injunction was granted on the merits; and, the question being one between solicitor and client, the verdict and judgment will not prevent the reopening the whole accounts. Lewis v. Morgan (a), Middleditch v. Sharland (b), Detillin v. Gale (c). [The Vice-Chancellor.—In Detillin v. Gale, the solicitor took a bond and judgment from his client without a settlement of accounts; but there there was no litigated matter. Here there is an adverse decision at law upon a matter litigated by the parties.] The verdict was a surprise upon the plaintiff, and would have been prevented but for an accidental delay in obtaining the injunction.

Mr. Purvis and Mr. James Parker, for the defendant.— The plaintiff had due notice of the action, and cannot complain of having been taken by surprise. The verdict is conclusive, and might have been consummated but for the injunction. In Bensley v. Payne (d), a bill was filed to set aside a bond which had been taken by an attorney from his client, and on which he had brought his action. The

<sup>(</sup>a) 5 Price, 83; 4 Dow. 51.

<sup>(</sup>b) 5 Ves. 87.

<sup>(</sup>c) 7 Ves. 583.

<sup>(</sup>d) Not reported.

1842. ABBEY 7. PETCH.

plaintiff in the action put in his answer before the trial. The trial came on, and he obtained a verdict. The plaintiff in equity then moved upon the answer for an injunction to stay further proceedings in the action. Lord Eldon said he would have granted the motion, if the plaintiff had come before verdict; but that, with the answer before him, he had gone to trial, and might have used the answer at the trial; that the plaintiff, therefore, having made that choice, he, Lord Eldon, was precluded from granting the motion. [The Vice-Chancellor,-The question in that case was probably the same at law and in equity. Am I, in this case, to consider the evidence which supported the verdict at law sufficient to preclude the trial here? Upon that point, Harrison v. Nettleship (a) is strictly applicable. [The Vice-Chancellor.-Must you not, in order to bring your case within that authority, shew that, as between attorney and client, an admission by a client of a debt due has precisely the same effect in equity as at law? It is a material ingredient in these cases, that the point in issue at law and in equity should be exactly the same. Another question is, whether the order for the injunction --- which was granted on payment of the money into Court, and from which you have not appealed—does not entirely put an end to the proceedings at law. An injunction on the answer stops every thing.] The injunction would not have prevented the plaintiff from moving for a new trial. Considering, however, the whole of the proceedings as removed into a court of equity, the admission which has been proved in this cause is clearly sufficient to bind the plaintiff, and the £3000 ought to be treated as an item in the account.

Mr. Simpkinson, in the course of his reply, commented on the fact of there being no written security for the £3000, and on Petch's having retracted his admission as

to that sum being due; and he contended that, under such circumstances, the Court could not treat the £3000 as an item in the account.

ABBEY
v.
PETCH.

THE VICE-CHANCELLOR.—This is a bill for an account. filed by a client against the personal representative of a solicitor with whom in his lifetime the client had various pecuniary dealings independent of transactions connected with his professional business, and with the exception of what relates to a sum of £3000 which has been the subject of argument, the directions are a matter of After directing the usual inquiries, his Honour The only question left is as to this £3000. proceeded. The blame, if any, attributable to the parties in respect of the obscurity in which these transactions were involved. does not belong wholly to Mr. Petch. He certainly was to blame, for it was his duty to keep regular accounts of all the dealings between himself and the plaintiff, which it is conceded he did not do. On the other hand, the plaintiff, under the circumstances, has not so strong a ground of complaint as many litigants in cases in some degree analogous to this, for he seems to have been an acquiescing party in that obscurity. I agree in the doctrines which have been laid down upon high authority, as to the dealings between solicitor and client, or, as might almost be said, between any principal and agent. These doctrines, however, must necessarily yield to circumstances. In the present case it appears that after the death of Mr. Petch the plaintiff was called on by the son of Mr. Petch, who was not professionally concerned with his father, and the plaintiff then admitted in the most distinct and positive manner the debt of £3000. This admission was made at a time when there was no suspicion of any influence arising from professional connection. It may not have been made until circumstances rendered it necessary to ascertain that the debt existed, but it was not made by surprise. It

1842. ABBEY v. Petch.

appears from evidence quite unexceptionable, that the plaintiff, during a course of years, paid interest to the testator, and an account is produced, which appears to have been sent by the plaintiff himself, in which he charges himself with an item of £60 for interest in October, 1831. and a similar item for interest in April, 1832, tallying exactly with the evidence of Petch, the witness. When to this unexceptionable evidence, not opposed by any evidence on the part of the plaintiff, is added the fact of the verdict obtained for £3000, I am of opinion that I ought not, at this distance of time and after the death of Petch, to suffer that sum to be taken as not a legitimate item of debit against the plaintiff in that account. I have alluded. it is true, to a verdict not ripened into a judgment: but I am entitled to look at that verdict for this reason, that it is plain that, but for the order for an injunction, there was nothing to prevent the defendant from ripening it into a judgment. Taking together the conversation, the admissions, and the verdict, I think I should not be doing justice if I allowed it to be a matter of question whether or not the defendant is entitled to include the sum of £3000 as an item in the account. Whether any other matters are to be included, it will be for the Master to consider.

Declare that in taking the account the Master is to consider that the plaintiff became liable to be debited in the account between him and Robert Petch, to the amount of £3000 or some greater amount, and that in respect of such amount, if not exceeding £3000, or in respect of £3000, part thereof, it was agreed between Robert Petch and the plaintiff, that the plaintiff should be debited with interest at the rate of £4 per cent. per annum. Let the costs of Mrs. Petch in the action at law be taxed and paid to her by the plaintiff, and let the sum of £1200, part of the sum in Court, be paid out to her, without prejudice. Continue the injunction, and reserve further directions and costs in equity.

1842.

### WARDELL v. CLAXTON.

Feb. 10th.

THE bill was filed by a tenant for life, under a will of Whereproperty personal estate, for the purpose of having new trustees appointed. The property was given, after the death of the tenant for life, to such persons as should then be next of kin of the testator.

None of the present next of kin of the testator were made parties to the suit.

THE VICE-CHANCELLOR directed that the bill should be amended by making those persons parties.

is bequeathed to A. for life, and after his decease to such persons as shall then be the testator's next of kin :upon a bill filed for the protection of the property, the next of kin of the testator living at the time of filing the bill must be made parties to the sait.

## MEMORANDUM.

In February, 1842, Francis Stack Murphy, Esq., of Lincoln's Inn, was called to the degree of the coif, and gave rings with the motto "Incidere ludum."

# DINSDALE v. DUDDING.

Feb. 13th.

JUDITH DUDDING, of Barrow, in the county of Lin- Upon a concoln, widow, by her will, dated the 10th August, 1813, directed her residuary personal estate, and a sum of £400 charged on her real estate, to be divided into three equal legatees were shares, and bequeathed one-third to her daughter Elizabeth Shearwood, one-third to her daughter Mary Westoby, and the remaining third to the children of her late daughter Judith Dinsdale equally, to be paid on their respectively attaining 21 years. She devised her real estate to her son John Dudding in fee, and appointed him sole executor of her will.

structive admission of assets: - Held, that residuary entitled to immediate payment of their legacies; and, under circumstances, with interest beyond the time allowed by the Statute of Limitations (3 & 4 Will. 4. č. 27, s. 40).

DINSDALE v.

The testatrix died in November, 1814. John Dudding proved her will and took possession of part, at least, of her real and personal estate.

Judith Dinsdale had five children only, viz., Alice, Judith, Richard, Elizabeth, and Susannah.

John Dudding, by his will, dated in October, 1827, executed and attested so as to pass real estates, devised all his real estates to his sons, the defendants Richard and John Dudding, and their heirs, as tenants in common, and appointed them his executors. John Dudding, the father, died in 1828, and his will was proved by his executors.

The bill was filed by Richard Dinsdale and his sisters, Elizabeth and Susannah, against Richard and John Dudding, praying payment of their respective shares of the residue bequeathed by Judith Dudding's will.

The bill stated that John Dudding, the father, had paid to Elizabeth Shearwood and Mary Westoby their shares of the residue, amounting to 3821. 8s. 4d. each; that he had fixed the share given to the children of Mrs. Dinsdale at the like sum, and had paid or caused to be paid to Alice and Judith Dinsdale, on their severally attaining 21, the sum of 76l. 9s. 8d. each, for their one-fifth shares of the said sum of 3821. 8s. 4d.; that the plaintiffs, though they had attained 21, had never received their shares of the said sum; that upon the death of John Dudding, the father, the defendants had received out of his personal estate more than sufficient to cover the plaintiff's demand, and, though they knew of such demand, had paid legacies bequeathed by John Dudding. That under the foregoing circumstances John Dudding, the father, had admitted assets of Judith Dudding; and the defendants had admitted assets of their testator sufficient to answer the plaintiffs' demand, and were personally liable for the same.

As farther evidence of an admission of assets by John Dudding, the father, the bill charged that his son, John Dudding, had, by his direction, drawn out a statement in writing as to the share of the children of Judith Dinsdale. This statement is referred to in the evidence. DINSDALE 5.

The defendants, by their answer, admitted assets of their testator sufficient to satisfy the plaintiffs' demand, if just. They, however, stated, that the testator had received assets of Judith Dudding to the amount of £648 only, exclusively of a small portion of the real estate, out of which he had They denied, to the best of their belief, paid her debts. that he had paid Elizabeth Shearwood and Mary Westoby their shares, except by way of set-off against a debt which they owed him. They admitted, however, that they had found amongst the papers of their testator three several papers, dated the 10th August, 1824, purporting to be receipts for the shares of Elizabeth Shearwood and of Judith and Alice Dinsdale of the net residue of the personal estate and effects of Judith Dudding, amounting to the sums of 3231, 7s. 7d., 641, 18s. 6d., and 641, 18s. 6d., and also two receipts for legacy duty, paid on two several sums of 3261. 12s. 11d., for the shares of Elizabeth Shearwood and the children of Judith Dinsdale.

On the receipts for the shares of Alice and Judith Dudding were indorsed receipts for interest to the 10th August, 1824, for 11l. 12s. 11d.; so that the whole sum which, according to the receipts, Alice and Judith each received, was 76l. 6s. 5d.

At the hearing of the cause the plaintiffs read the evidence of Judith Dinsdale, which was to the following effect:—
That she remembered the defendant, John Dudding, coming to her father's house at Thornton Curtis sometime in the year 1824; that he then stated to her and her father, (since deceased), that each one-third share of the residue of the personal estate of Judith Dudding amounted to the sum of 3821. 8s. 4d.; that the deponent then received of the defendant one-fifth part of that sum for her share, and that her sister Alice also, at the same time, received another fifth part of the same sum for her share; that her

DINSDALE T. DUDDING.

father asked the defendant for some statement of the amount of the shares which would be coming to his three other children, meaning the plaintiffs, who were then under age, and that the defendant thereupon wrote the following memorandum, which he delivered to her father:—"Mrs. Dinsdale's share of residue, due the 13th May, 1824, 3821. 8s. 4d."; that he then said to her father, he would like to pay the three other shares if he could get a proper receipt, but he could not, as they were all under age.

The memorandum was produced in evidence.

Mr. Swanston and Mr. Elmsley, for the plaintiff, contended, that there being sufficient admissions of assets for that purpose, the plaintiffs were each entitled to immediate payment of the same sum which had been paid to each of their sisters, with interest; and that this was a case in which no part of the plaintiff's claim for interest would be barred by the Statute of Limitations. Phillipo v. Munnings (a).

Mr. Wigram and Mr. Metcalfe, for the defendants, contended, that there was not an admission of assets of the testatrix, Judith Dudding, to the extent insisted on by the plaintiffs; and submitted, that they were entitled to an inquiry on that point. They also submitted, with respect to interest, that there was sufficient in the answer to shew that they claimed the benefit of the statute.

In reply to a question from the Court, the plaintiffs' counsel stated, that they were willing to waive interest previous to August, 1824.

In the course of the argument, The Vice-Chancellor,

with reference to the Statute of Limitations, mentioned Sheppard v. Duke (a).

DINSDALE

DUDDING.

THE VICE-CHANCELLOB.—The defendants are sued as representing and admitting assets of John Dudding, who was the trustee and executor of the will of Mrs. Dudding, the original testatrix in this cause.

The bill may be considered as distinctly putting in issue the case that John Dudding did, in his lifetime, collect assets of Mrs. Dudding, to an amount producing the clear sum of £382 and upwards, as the share of the residue to which the children of Mrs. Dinsdale were entitled under the will, and that his son, John Dudding, admitted in writing that fact.

That case so alleged has, in my opinion, been proved by the pleadings, the parol evidence, the documents proved, and the documents scheduled in the answer, without laying any stress (as undoubtedly none should be laid at this period of the cause) upon that part of the evidence which relates to conversations not put in issue by the bill.

In this state of the pleadings and the evidence, the plaintiffs do not desire to carry the accounts further than from the time of John Dudding's admission of the amount, but are willing to consider the amount of each third as it was in 1824, and to take interest from such part of the year 1824 as the Court may think fit.

It appears from the document which has been proved on behalf of the plaintiffs, that £382 was stated to be the amount due to Mrs. Dinsdale's children in May, 1824; but that receipts were given in August, 1824, by which

(a) 9 Sim. 567, in which the doubt expressed in the reporter's note in 2 Myl. & Cr. 315, as to whether the statute applies to mere personal legacies is cleared up. In

Prior v. Horniblow, 2 Y. & C. 200, which was decided before either of the cases mentioned in the principal case, the act was held to apply to a residue of personalty.

DINSDALE 6. DUDDING.

the share of each of the children in the sum in question appears to have been treated as amounting to £76.

It appears to me, therefore, that full justice will be done to the defendants, who admit assets of their testator, by decreeing payment of the amount of each third of the plaintiffs' with interest from the 10th of August, which is the latest of the two dates of 1824.

With respect to interest, it is doubtful whether the benefit of the statute is claimed by the answer. But, assuming it to be so, I am of opinion, that if a share of a residue, such as this, is within the 40th section of the statute, circumstances have occurred which take it out of that section, and bring it within the rule laid down in *Phillipo* v. *Munnings*.

Under these circumstances, I shall not send this case to the Master's Office.

Oaden that the defendants Richard Dudding and John Dudding, do, within a fortnight after service of this decree, pay to the plaintiffs respectively the sum of £76, with interest thereon at the rate of £4 per cent, per annum from the 10th day of August, 1824, up to this day; the amount of such interest, at the request of both parties, to be verified by affidavit, the plaintiffs preferring to accept such interest so verified to a reference being directed to one of the Masters of this Court to ascertain the amount thereof. Refer it to the Master to tax the plaintiffs their costs of this suit up to this time, and let such costs, when taxed, be paid by the defendants personally. Liberty to any of the parties to apply.

### BROOKS v. PURTON.

IN February, 1841, the defendant Purton commenced The mere fact an action at law in the Court of Queen's Bench against the plaintiff Brooks, for the sum of £225. In May. 1841. Brooks filed his bill in the Court of Chancery against Purton and various other persons, for the purpose, among other things, of restraining proceedings in the action at On the 2nd June, 1841, Charles Cooper, one of The demurrer was submitted the defendants, demurred. to, and the bill amended. On the 11th June, Purton put in a plea of want of parties, which plea was submitted to, and the bill again amended. On the 26th June, 1841, the defendant, Purton, demurred to the amended bill for want of parties. That demurrer was submitted to, and the bill was a third time amended. On the 3rd July, the £225 was paid by Brooks into the Court of Queen's Bench, and Purton afterwards proceeded to trial, and obtained a verdict in the action. On the 21st July, Brooks moved for and obtained the common order for an injunction for want of answer. On the 4th August, 1841, Purton filed his answer to the plaintiff's bill. On the 5th August, the plaintiff obtained another order to amend, but did not take any proceeding under that order. On the 24th November he obtained, under the 2nd of the General Orders of 9th May, 1839, an order to amend, without prejudice to the injunction, and within the week limited by the order for that purpose he amended his bill. On the 17th December, 1841, the last-mentioned order was, on a motion for that purpose, discharged by the Master of the Rolls for irregularity.

The plaintiff now moved, pursuant to notice, that he might be at liberty to amend his bill in this cause without prejudice to the common injunction obtained by the plaintiff against the defendant Purton, and against the defendants Richard Samuel White, Charles Cooper, and Wasey 1841.

Dec. 21st. of amending a bill does not of itself dissolve or discharge the common iniunction. though it may furnish a ground for dissolving or discharging it on an applica-tion for that purpose.

BROOKS
v.
PURTON.

Sterry, by amending the bill in the manner and according to the alterations already made and appearing on the record of the said bill, which were made in pursuance of the order bearing date the 24th day of November, but which order had been since discharged for irregularity; and that such amendments might be adopted for the required purpose accordingly, and upon payment of 20s. costs to the defendants William Purton and Thomas Cooper, but without costs as to the other defendants amending their office copies; or that the plaintiff might be at liberty to amend his bill as he might be advised, without prejudice to the injunctions, and upon the terms aforesaid.

The defendant William Purton at the same time moved that the amended bill might be taken off the file for irregularity, or the amendments be expunged, and the subpoena be quashed.

Both motions came on together.

Mr. Cooper and Mr. Romilly, for the plaintiff Brooks, in support of the first motion.—The order of the 5th August has created the present difficulty. The time limited for amending by that order was suffered to run out: and, on the 24th November, an order to amend within a week was obtained under the 2nd General Order of May, 1839. The Master of the Rolls discharged the latter order for irregularity, but the cause having been transferred to this Court, was unable to enter into the merits, or do more than discharge the order. In support of the application they referred to Ferrand v. Hamer (a).

Mr. Russell and Mr. Chandless, for the defendant Purton.—The amended bill was filed on the 26th November, after the last General Orders came into operation, and does not comply with these orders, the interrogatories not being numbered. There is no ground for asking that the amend-

ment may be without prejudice to the injunction; Ferrand v. Hamer is in favour of the defendant, for it shews that the Lord Chancellor would have considered the practice different if it had been the case of a re-amendment, as in the present instance, and not the case of an amendment only.

BROOKS v. PURTON.

1841.

Turner v. Bazeley (a), Sharp v. Ashton (b), Mair v. Thellusson (c), Pratt v. Archer (d), and The Attorney General v. Cooper (e), were also cited.

Mr. Stinton, for the defendant Charles Cooper.

Mr. Swanston, for the defendant Thomas Cooper.

Mr. Simpkinson, for the defendant Mary Purton.

THE VICE-CHANCELLOR.—It seems to me that it would be very hard, considering the circumstances under which the amendment was made, and under which the order to amend was discharged, to preclude the plaintiff from all opportunity of amending his bill. On the other hand, I am not at all satisfied with the explanation given of the abandonment of the order of the 5th August. Nothing which has been stated on that subject has satisfied me. The Master of the Rolls having discharged the order to amend, I am of opinion that the amendments should be treated as if they were expunged; but that the plaintiff ought to be at liberty to amend within a week, not adding any new parties nor varying the statement in the record as last amended. This will give the means of meeting the case as to the numbering of the interrogatories, if necessary, on which I give no opinion. If at the end of that time any of the matter inserted by the last amendment shall remain, it must be treated as introduced under this I say nothing in the order as to its being without prejudice to the injunction.

<sup>(</sup>a) 2 Ves. & B. 330.

<sup>(</sup>d) 1 Sim. & S. 433.

<sup>(</sup>b) 3 Ves. & B. 144.

<sup>(</sup>e) 3 Myl. & Cr. 258,

<sup>(</sup>c) Id. 145.

1841. BROOKS 81. PURTON.

THE order directed the amendments last made to be considered as expunged—but they were not to be actually expunged—and that the plaintiff should be at liberty to amend the bill within one week from that time; and if at the end of the week any portion of the amendments directed to be considered as expunged should remain upon the record, the same should be considered as amendments introduced under the present order; but the plaintiff was not to be at liberty to vary the state of facts now appearing upon the record, or to add any new party thereto.

At the end of the week the amendments which, by the last-mentioned order, were directed to be considered as expunged, remained upon the record. The bill was also further amended, by numbering the interrogatories, and by the alteration of some formal parts.

On the 14th January, 1842, a summons was taken out on behalf of Purton, in the action at law, for Brooks to shew cause why the £225 should not be paid out of the Court of Queen's Bench for Purton. The judge, however, declined to make any order, but said the parties might apply to the Court. On the 24th January, Purton, on an application to the Court, obtained a rule for Brooks, upon notice to be given to his attorney, to shew cause, on the 28th January, why the £225 should not be paid out of Court.

1842. Jan. 31st.

In an action at law, the defendant paid into the court of law the sum demanded in the action, and filed his bill in equity to re-

strain the action, and obtained the comrestraining the plaintiff at law

The plaintiff Brooks now moved, pursuant to notice of motion, that the defendant Purton might stand committed to her Majesty's prison of the Fleet for a breach of the injunction; and, in support of the motion, filed two affidavits, detailing the facts.

Mr. Cooper and Mr. Romilly, for the motion.—It cannot mon injunction be contended by the defendant Purton, that the amend-

from proceeding to execution. The plaintiff at law having tried the action and obtained a verdict, applied for and obtained a rule nisi to shew cause why the money paid into the court of law should not be paid out to him:-Held, that this proceeding was a step towards execution, and was a breach of the injunction.

ment of the bill has destroyed the injunction, for no instance can be found of an order to dissolve or discharge an injunction upon an amendment. In Ferrand v. Hamer (a), Lord Cottenham decided, that an injunction was not dissolved by the amendment of the bill under an order, obtained as of course, for leave to amend without prejudice to the injunction. The proceeding taken by Purton is clearly a breach of the injunction; for it has been decided, that the taking of a single step towards execution beyond the completion of the judgment, is a breach of an injunction to stay execution. Bullen v. Ovey (b); Franklyn v. Thomas (c); Mills v. Cobby (d).

BROOKS
v.
PURTON.

Mr. Russell and Mr. Chandless, for the defendant Purton.—Assuming that the injunction still exists, the proceeding taken by the defendant does not amount to a breach of it. The injunction only stayed execution, leaving the defendant at liberty to complete the judgment at law. The plaintiff, by paying the money into Court, has placed it in a situation which enables the defendant to reach it without proceeding to execution. So long as the Court of Law has any thing to do in its judicial capacity, the defendant may proceed without committing a breach of the injunction. The proceeding to make the rule absolute would not even be a breach of the injunction, for by the rule of the Court he would not be entitled to have the money paid out until after the rule had been made absolute, and, until he actually took the money out of Court, he could not commit any breach. Franco v. Franco (e); Hankey v. Morrice (f). The cases cited for the plaintiff do not apply, the injunction in those cases extending to stay all proceedings. Admitting that no order to dissolve or dis-

(e) 2 Cox, 420.

<sup>(</sup>a) 4 Myl. & Cr. 143.

<sup>(</sup>b) 16 Ves. 141.

<sup>(</sup>f) 3 P. Wms. 146; 2 Eq. Ab. 528.

<sup>(</sup>c) 3 Meriv. 225.

<sup>(</sup>d) 1 Meriv. 3.

BROOKS v.
PURTON.

charge an injunction after amendment can be produced, that circumstance arises from its being a settled rule, that by an amendment the common injunction is destroyed. Bliss v. Boscawen (a); Turner v. Bazeley (b); Sharp v. Ashton (c); Mair v, Thellusson (d); Pratt v. Archer (e); Pickering v. Hanson (f); Home v. Watson(g); Davis v. Davis (h); Patton v. Panton (i); Edwards v. Edwards (k); De la Torre v. Bernales (1). The plaintiff has confounded the case of a special injunction with the case of the common injunction, and has, by his own act in amending the bill, rendered it impossible for the defendants to perform the terms of the order upon which the injunction was obtained, those terms being in effect, that the injunction should continue until the defendant should put in a full answer to the original It is true, that where exceptions to an answer have been allowed, the bill may be amended without prejudice to the injunction; but this is only the exception to and proves the rule. In Ferrand v. Hamer, it was not necessary to determine the question whether it was a motion of course for a plaintiff, after the common injunction obtained. and before answer, to obtain an order to amend without prejudice to the injunction; the real question in that case was, whether, where there are two defendants, against one of whom only an injunction had issued, such an order could be impeached by the defendant against whom the injunction had not issued. Lord Cottenham, in his observations in that case, seems to have been influenced by the statement of Mr. Dickins in Mason v. Murray, who, in support of his statement, refers to Lord Bacon's 20th Ordinance. But, on referring to Lord Bacon's 20th Or-

<sup>(</sup>a) 2 Ves. & B. 102.

<sup>(</sup>b) Id. 330.

<sup>(</sup>c) 3 Ves. & B. 144.

<sup>(</sup>d) Id. 145.

<sup>(</sup>e) 1 Sim. & S. 433.

<sup>(</sup>f) 2 Sim. 488.

<sup>(</sup>g) Id. 85.

<sup>(</sup>h) Id. 515.

<sup>(</sup>i) 3 Anstr. 651.

<sup>(</sup>k) Dick. 755.

<sup>(1) 4</sup> Madd. 396.

dinance, it will be found to make a manifest distinction between special injunctions and common injunctions. Lord Cottenham in his judgment, though he referred to Mason v. Murray, yet omitted to notice the subsequent decision in Dickins of Edwards v. Edwards (a), and the later case of Woodroffe v. Daniel (b). If Lord Cottenham's decision on the subject be right, there was no necessity for the 2nd Order of May, 1839, and such an order was useless. Mayne v. Hotchin (c), Adney v. Flood (d), and Dipper v. Durant (e), were all cases of exception to the general rule.

BROOKS v. PURTON.

THE VICE-CHANCELLOR.—I decide this case without reference to the order of May, 1839, which I think does not affect it, nor can I attend to the argument of the defendant, grounded on the delay to which, as he suggests, he has been or may be exposed; for the last amendment made by the plaintiff was fully answered by this defendant some days before the commencement of the present term. The first question is, whether the injunction still subsists, notwithstanding the last amendment, there not having been any order to dissolve or discharge it. I conceive that, according to Lord Cottenham's opinion, and according to the practice of the Court, as it has been understood. at least since the case of Ferrand v. Hamer, the mere fact of amending a bill, though it may furnish a ground for dissolving the common injunction on an application for that purpose, does not of itself ipso facto dissolve it, though there has been no insufficient answer, and though the injunction may never have been continued on the merits. There are expressions in the books, attributed to authorities of great eminence, which seem to be founded on a different view of the rule; and if I were clearly satisfied that those authorities meant so to lay down the rule, and

<sup>(</sup>a) Dick. 755.

<sup>(</sup>d) 1 Madd. 449.

<sup>(</sup>b) 9 Sim. 410.

<sup>(</sup>e) 3 Meriv. 465.

<sup>(</sup>c) Dick. 255.

BROOKS
9.
PURTON.

also that the rule still subsisted without variation, I should not feel myself at liberty to depart from it. But not being so satisfied, nor thinking it, independently of authority, required either by principle or convenience to hold the common injunction ipso facto dissolved by amendment, under such circumstances as I have mentioned, I conceive -especially having regard to the fact that the order under which the amendment in question was made has never been appealed from-that the injunction in this case still subsists, though I repeat that cases may, in my opinion, be easily supposed in which the mere fact of amendment would give the defendant a right to apply to dissolve the common injunction, without answering, and independently of the merits of the cause: the common injunction and the special injunction being obviously open to this distinction, that the special injunction may be dissolved on the merits, not only without a full answer but without any answer.

The next question is, whether the proceeding taken by the defendant Purton has been a breach of the injunction. It is certainly a step towards execution, and it is in my opinion, both on principle and authority, a breach of the injunction. The proceeding at law must, therefore, be discharged at the expense of the defendant Purton. No good reason has been assigned for the plaintiff's affidavit; he must therefore pay the costs of that affidavit, as also of such parts of the other affidavits as are irrelevant to the present application. In all other respects, the defendant Purton must pay the costs, and also the costs of discharging the rule nisi.

March 1st.

A defendant obtained an order to answer, plead, or de-

1 Stare 631.

mur, not demurring alone." The words "plead, &c.," were afterwards, on motion, struck out of the order. The defendant then filed a plea. Ordered, that the plea should be taken off the file, with costs to be paid by the defendant.

the 20th of the Orders, 21st Dec. 1833, for further time to answer, stating by his affidavit certain reasons which rendered a further time to answer necessary. The Master allowed him four weeks time " to answer, plead, or demur, not demurring alone." The words in italics were, on special application made to the Court for that purpose, struck out of the order. The defendant then filed a plea.

1842. BROOKS PURTON.

Mr. Wigram and Mr. Romilly, for the plaintiff, now moved that the plea might be taken off the file for irregularity, with costs.

Mr. Russell and Mr. James Parker, contrà. contended that putting in the plea was a sufficient compliance with the order for time to answer; and also, that a motion to take a plea off the file was not sustainable. On the latter point they cited Anon. (a). [The Vice-Chancellor.—In Moon v. Lee (b), Sir John Leach ordered a plea to be taken off the file notwithstanding that case.]

The other authorities referred to in the course of the argument were Kay v. Marshall (c), Anon. (d), Roberts v. Hartley (e), Barber v. Crawshaw (f), and De Minckuitz v. Udney(g).

THE VICE-CHANCELLOR said that, in deciding, as he did, that the plea ought to be taken off the file, and that the defendant pleading it must pay the costs of the application and the costs properly incurred by the plaintiff by reason of the filing of the plea, he proceeded on the particular circumstances of the case. The defendant had applied to the Master for time to answer. The application was spe-

<sup>(</sup>a) Moseley, 207.

<sup>(</sup>e) 1 Bro. C. C. 56. (b) Not reported. (f) 6 Madd. 284.

<sup>(</sup>c) 1 Keen. 191.

<sup>(</sup>g) 16 Ves, 355.

<sup>(</sup>d) 2 P. W. 464.

1842. BROOKS PURTON.

cial and supported by affidavit, and the affidavit stated grounds and reasons having reference and applying exclusively to an answer, in the ordinary acceptation of the The Master intended, or ought to have intended, to grant time to answer, taking the word answer in its ordinary sense. The Master, however, had made a more extended order, of which the Court had expunged so much as related to time for pleading and demurring. Afterwards, with the full knowledge of all the circumstances of the case, the defendant had filed a plea. That plea, in his Honour's opinion, had been improperly and vexatiously filed, and must be taken off the file; but it was to be understood that the present judgment proceeded entirely on the circumstances of this individual case.

Feb. 8th, 10th.

CRAGG v. FORD.

Upon the dissolution of the partnership of A. and B. it was agreed that B. should undertake the business of winding up the affairs of the firm:-Held, that B. was not solely the loss occasioned by the injudicious sale of part of the partnership effects, inasretained his general rights as a partner,

IN March. 1801, the plaintiff and defendant entered into partnership in the business of commission merchants, at Liverpool, in the name of William Ford & Co. No articles of partnership were then entered into, but it was agreed that the business should be conducted by the defendant as the acting managing partner, and that the profits of the partnership should be equally divided between the partners, after alchargeable with lowing the defendant 100% per annum for his salary.

This partnership continued upon the footing above mentioned until the 31st December, 1817, when, except for the purpose of winding up the concern, it was dissolved. much as A. still The dissolution, however, was not notified in the Gazette until the year 1823.

and consequently had full power to prevent the sale.

Quere, whether, upon the dissolution of a partnership not under articles, a partner has an inherent right in that character, without the assistance of a court of equity, to insist upon the sale of the partnership effects?

In July, 1817, Rutgers & Seaman, of New York, who had dealings with Ford & Co., and were indebted to them in respect of such dealings in a sum of 4358l. 7s. 9d., consigned to Ford & Co. 155 bales of cotton. Of these, 108 bales were sold by the defendant at various times in 1817 and 1818, at rates between 23d. and 21d. per pound, and by the produce of these sales, amounting to 2968l. 2s., Rutgers & Seaman's debt was reduced to 1389l. 19s. 7d. The remaining 47 bales were not sold by the defendant until the years 1827 and 1828, and then fetched only the sum of 1231. 3s. 11d., being at the rate of 63d. and 61d. By this sum of 1231. 3s. 11d., Rutgers & Seaman's debt was further reduced to 1266l. 15s. 9d., but as that firm had become insolvent, the principal question in the present suit was whether the defendant was entitled to carry the last-mentioned sum to the account of profit and loss in the partnership, or whether he was, by reason of negligence in delaying the sale of the 47 bales, to be charged individually with the whole or any part of that sum.

The Master found, that some time previous to the 16th December, 1818, the plaintiff applied to the defendant verbally, requesting that the remaining bales of cotton should be immediately sold, and that the account between the firm of William Ford & Co. and Messrs. Rutgers & Seaman should be closed, or that the defendant would take the whole of the cotton on his own account, or that he would immediately sell the plaintiff's share of the cot-And he also found, that the plaintiff, in several letters addressed by him to the defendant, and bearing date respectively the 16th, 17th, 21st, and 23rd days of December, 1818, which letters were duly received by the defendant, repeated the same request, and complained that the cotton had been retained and continued unsold contrary to his expressed wishes. And he found, that after the commencement of this suit, and on or about the 6th February, 1824, the plaintiff, through his solicitor, wrote

CRAGG

CRAGG v. FORD.

to the defendant, requesting that the cotton might be sold without prejudice, and that he enclosed the form of advertisement of the sale, and that the defendant refused to accede to such proposal. And he further found, that on the 16th December, 1818, the price of cotton at Liverpool was 16d. to 21d. per pound, and that if the 47 bales of cotton so consigned to William Ford & Co. by Messrs. Rutgers & Seaman had been then sold at 21d. they would have produced the sum of 12021. 5s. 9d. The Master. however, upon consideration of all the facts of the case, expressed his opinion to be, that the defendant was, as the managing partner in the said concern of William Ford & Co., authorized to place the said sum of 1266l. 15s. 9d., being the amount of the loss arising from the cotton so consigned to the said partnership, to the account of profit and loss of the said concern, and also to place to the said account the sum of 49l. 18s. 5d., being the amount paid by the defendant on account of the warehousing and insurance of the cotton subsequent to the 31st of December, 1817.

To this report the plaintiff took exceptions, on the ground that the defendant ought to be charged in account with the whole of the 1266l. 15s. 9d. and 49l. 18s. 5d.; or at all events that the only portion of the 1266l. 15s. 9d. which ought to be carried to the account of profit and loss was the difference between that sum and 1202l. 5s. 9d., the amount which the 47 bales would have produced if sold on the 16th December, 1818.

Mr. Spence and Mr. Goodeve, for the exceptions, contended that it was the defendant's duty to sell the cotton immediately on the dissolution of the partnership; that in the absence of express stipulations, the general rule is, that upon the dissolution of the partnership a sale must take place, and that here the defendant as managing partner was a fortiori bound by this rule. They cited Crawshay v.

Collins (a); Featherstonhaugh v. Fenwick (b); Cook v. Collingridge (c); and Rigden v. Peirce (d).

CRAGG

Mr. Anderdon and Mr. Terrell, contrà.—This bill was filed in 1823, and the plaintiff might have applied by motion for a receiver and a sale. Under any circumstances. therefore, at this late period, he ought not to be allowed to fix the defendant with the consequences of a mere erroneous exercise of discretion. There is no such general rule, however, as that which has been stated on the other side, that eo instanti on the dissolution of a partnership, not under articles, the partnership property must be sold. The part ownership is in no degree affected by the dissolution, and neither then nor at any other stated time has one partner a right to control the other in the exercise of his legal rights. In the cases cited, the dissolution was by death. But even then it was considered that there was no right of sale until the period which the Court should appoint. Here there was nothing to prevent the plaintiff from interfering for the purpose of having a better discretion exercised. Although Ford was the manager, it is not pretended that the plaintiff had not an equal control over the partnership property. His partnership right was not excluded by compact, though he chose to pay a salary for management. Besides, the cotton was in a hired warehouse, to which he might have had access at any time. is impossible to say that mere notices from one partner to another are to determine their rights. As to the sale of the property, the Court allows the same discretion to partners as to executors: Buxton v. Buxton (e).

Mr. Spence, in reply.—The general rule which has been contended for is supported by the authority of Sir William

<sup>(</sup>a) 15 Ves. 218.

<sup>(</sup>d) 6 Madd. 353.

<sup>(</sup>b) 17 Ves. 298.

<sup>(</sup>e) 1 Myl. & Cr. 80.

<sup>(</sup>c) Jac. 607.

CRAGG D. FORD. Grant, in Featherstonhaugh v. Fenwick. It is contended, on the other side, that the right of sale can only be enforced in equity. But it would lead to very serious consequences to hold that a man's rights, in these cases, depends on whether he files a bill. Whether the dissolution is by death or inter vivos cannot affect the general rule. The Court allows a discretion to executors because third persons are affected by their acts: Wedderburn v. Wedderburn (a).

Feb. 10th.

THE VICE-CHANCELLOR.—In this case the question is, whether the defendant is to be charged with the loss which has arisen from delaying the sale of some cotton, which in effect is to be considered as having belonged to the partnership at the time of its dissolution or expiration.

The defendant had been the managing partner, and must, I think, be taken to have been the person who principally undertook the duty, and was principally trusted with the charge of winding up the affairs of it. The plaintiff was, I conceive, entitled to have the cotton sold sooner than it was, and sold at a time when the loss would have been wholly or to a great extent obviated. Under these circumstances, if it had been established in proof, that the defendant had acted fraudulently, or had, beyond merely refusing to sell, so acted as to prevent the plaintiff from selling, it is very possible that I might have acceded to the plaintiff's demand, seeking to charge the defendant with the loss. But fraud is out of the question. fendant, whether wisely or unwisely, yet, as it must I think be taken, in the honest exercise of his judgment, considered that the sale (a matter in which he was interested as well as the plaintiff) ought to be delayed. The plaintiff, for any thing that appears, might himself have sold the cotton, or have taken measures for its sale, or

have possessed himself of it. He might have filed a bill, and applied for a receiver. Nothing of this kind is however done, and the partners appearing to have had, at least after the termination of the partnership, equal powers and equal means of enforcing their rights, I cannot say that the Master is wrong in having declined to throw all the consequences of the delayed sale on Mr. Ford; and this being the only point made against the report, I must confirm it; but I shall give the plaintiff his deposit, and no costs of the exceptions on either side.

1842. CRAGG FORD.

Exceptions overruled.

During the original partnership of Cragg and Ford, Held, under another partnership was formed between them and Natha- circumstances shewing a geneniel Lawrence, in the same style or firm of W. Ford & Co., ralsoquiescence in the acts of under articles, dated the 11th April, 1812. The object of his copartners, this latter partnership was to extend the business of the ner was liable former partnership by means of a connexion with America; to share the losses arising and for that purpose Lawrence went over to New York, from certain where he resided and acted as a partner, at a salary of tered into by £450 a year.

adventures enthe copartners, in breach of the partnership

Feb. 9th, 10th.

The articles contained clauses to the following effect: terms of the viz. that no bill or bills of exchange should be drawn, articles. indersed, or accepted in the name of the said concern, at any place or places out of Liverpool, by any of the partners, other than and except such bills as were necessary for payment of the said annual sum of £450; and that no sacrifice should be made in any way for obtaining orders or commission, either by adventuring jointly with the shippers of any goods or merchandize, or by advancing or committing the credit or liability of the said concern in anywise beyond two-thirds, or at the farthest three-fourths of the real value or invoice price of any such goods or merchandizes as might be consigned to the said partnership concern, at the place from which consigned, and not then, without having first received as security for the same

CRAGG

bills of lading of the said goods, with orders to make insurance thereon, and full power to sell the same within a given reasonable time.

On taking the accounts of the partnership of Cragg, Ford, & Lawrence in this suit, (which was a distinct suit from that which involved the affairs of Cragg & Ford only), the question was whether the partnership should be charged with two sums of £1100 and £624, being the respective amounts of certain losses arising from adventures, in which Ford and Lawrence had been engaged, contrary, as the plaintiff Cragg alleged, to the above-mentioned provisions in the articles.

It appeared from the Master's report, that in 1818, and during the continuance of the partnership, a quantity of cotton was shipped by a house in America, on board the Ottawa, bound for London, on the joint account of the shippers, W. Ford & Co., and Samuel Williams, of London, and that for this shipment several bills were drawn on W. Ford & Co. by Lawrence, dated respectively, the 6th and 7th November, 1818, which were presented for acceptance in England in the early part of the following December, and subsequently accepted by Ford in the partnership name. In respect of this transaction, the Master found that a loss had been incurred to the extent of £1100.

The other transaction, the loss in respect of which the Master found to amount to £624, arose from a contract of a similar nature, entered into by Lawrence in October, 1818, the bills for which were dated in December, 1818, and drawn and accepted in the same manner as the former bills, the goods arriving in London in January, 1819.

On the 24th of November, 1818, which was before Ford accepted the bills, the plaintiff wrote and sent a letter of that date to Ford, containing the following expressions:—
"Seeing, as I do, trespass after trespass attempted, under the plea of usage, in competition for business, it will be

the best way to tell Mr. Lawrence that we can admit no deviation from the articles as to our rule of business. my experience as a merchant, both before and since these rules and conditions were so deliberately and unanimously determined upon, convince me more and more of the prudence of keeping to them rigidly. Indeed the additional observations I have had an opportunity of making upon the hazard of a more open system, and the losses we have already sustained since these rules were formed, (say nothing of narrow escapes by adopting the more unguarded description now so common as to security and credit), make it in my opinion absolutely necessary for me now to add, that any deviation from the rules I have alluded to. and which were inserted in the articles of partnership. must now be at the risk of those who break them."

In the course of 1819, the plaintiff wrote several letters to Ford, in which he complained generally of the manner in which Ford and Lawrence were conducting business by entering, as he conceived, into too extensive speculations. He did not, however, by these letters or otherwise, before the dissolution, specifically object to entries being made of the above-mentioned adventures in the partnership books, and they were entered accordingly.

In August, 1819, Lawrence returned from America, from which time till the dissolution of the partnership he and Ford were managing partners, with a salary of £200 a year each. On the 21st April, 1822, the partnership terminated by notice from Ford and Lawrence to the plaintiff.

Upon the termination of the partnership, and afterwards before the Master, the plaintiff remonstrated against the entries of these adventures being allowed to stand in the partnership books, insisting that these transactions were in violation of the articles, and that the partnership ought not to be charged with the loss occasioned by them. The Master, however, was of a different opinion, and reported CRAGG v. Ford. CRAGG V. FORD. accordingly; whereupon exceptions were taken to his report by the plaintiff.

Mr. Spence and Mr. Goodeve, for the exceptions, contended that the acceptance of the bills by Ford was in defiance of the plaintiff's letter of the 24th November, and that that notice was a sufficient repudiation of the adventures in question, as well as of all other adventures of the same sort. They also relied on the subsequent letters of the plaintiff.

Mr. Anderdon and Mr. Terrell, contrà.

The Vice-Chancellor, in the course of the argument, remarked that the word "now" in the last line of the letter of the 24th November seemed to refer to the future acts of the copartners. He also observed, that nothing in any of the plaintiff's letters was addressed to the entries of the specific adventures in the partnership books.

Feb. 10th.

The Vice-Chancellor.—Upon a question of this nature I should feel great distrust of my own judgment, if differing from the conclusion of the able and experienced Master whose report this is; but a perusal of the papers has confirmed the impression which I received during the argument. I think the Master right. He appears to have taken the same view as I do of the letter of the 24th November. Complaining, as by this letter the plaintiff did, of certain irregular transactions (irregular according to the terms in which the partnership articles were expressed) into which Mr. Lawrence had entered in America, he does not in it, and does not subsequently, during the continuance of the partnership, claim to throw on Mr. Ford and Mr. Lawrence, or either of them exclusively, the objectionable transactions which up to that time had taken place. The letter contains prohibitory language as to the

future, but does not seem to question the liability of the partnership in respect of what theretofore had taken place.

It appears to have been considered by the parties and the Master, and the argument before me has proceeded on the basis, that Lawrence had embarked previously to the 24th of November in the two adventures which are the subject of dispute. This is proved with regard to one, and I take it as admitted with regard to the other. No substantial difference, as to time or otherwise, between the two has been suggested in the argument. The bills, however, in each case did not become due, nor were accepted, nor arrived in England, until after the 24th of November. They were accepted by Ford as for the partnership, and paid out of the partnership funds. The whole matter appears in the year 1819 in the partnership books, which were always open to the plaintiff, and with the contents of which he must be taken to have been acquainted throughout the partnership, which is determined not before the year 1822, and then not by his act, but by Ford and Lawrence.

Taking the whole of the circumstances together, I do not find sufficient grounds to enable me to say that the report is wrong in fixing the partnership with the two adventures in question.

Exceptions overruled.

CRAGG TORD. 1842.

Feb. 19th. 21st, 22nd, March 8th.

Testator, after giving at the commencement of his will various pecuniary legacies, and bequeathing all sidue of his ready money, securities for money, and monies in the funds, to trustees, upon certain trusts. concluded his will as follows:

## PARKER V. MARCHANT.

ROBERT PARKER, formerly of Maidstone, and afterwards of the city of Bath, Esq., by his will bequeathed and devised as follows:--" I direct, in the first place, all my debts to be paid. I then give and bequeath to my dear the rest and re- and affectionate wife, Helen, £60,000, £3 per Cent. Consols. part of a larger sum standing in my name in the Bank of England. Also, I give and bequeath to Elizabeth, the widow of Charles Bedford Young, deceased, £10,000, part of the aforesaid £3 per Cent. Consols. Also, to Mary Ann Young, her daughter, £5000, other part of my aforesaid £3

-" And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever; and I do hereby constitute and appoint her, my said wife, sole executrix of this my will ":—Held, that this clause carried the residue of the testator's property to the wife.

Although the words "goods, chattels, and effects" may frequently be considered as having

been used by a testator in a restricted sense, yet primd facie their import is general; and there are good grounds for considering them as used in a general sense, either where they are not placed in connection with words of locality, or where they follow the enumeration of specific articles, or where there are no expressions in the will shewing a doubt in the testator's mind as to their comprehensiveness, or where the bequest in which they are contained is followed up by

the appointment of an executor.

Testator by his will bequeathed as follows:—I direct in the first place all my debts to be paid. I then give and bequeath to my wife £60,000 £3 per Cent. Consols, part of a larger sum standing in my name in the Bank of England; also, I bequeath to A.£10,000, other part of the aforesaid £3 per Cent. Consols. Also, I give to B.£500, and to C.£100; also I give to D. and E. all the rest and residue of my ready money, securities for money, and monies in the funds, upon trust to invest, &c., and to pay the dividends to my wife for life, and after her decease to divide the capital amongst F., G., H., and I. The testator then, after devising his real estate to the same trustees upon certain trusts, gave all his residuary personal estate to his wife:—Held, that the testator's debts were payable out of his personal and real estate according to the usual order of administering those estates, the general residuary personal estate being first applicable; but that his pecuniary legacies were primarily, if not solely, payable out of the "ready money, securities for money, and monies in the funds.

A bequest of the testator's "ready money" comprehends money of the testator in the

hands of his banker.

Quere, whether a bequest of "all the rest and residue of my ready money, securities for money, and monies in the funds," will comprehend property of that description acquired after the date of the will.

Testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, and then added, "to the other servants £500 each":—Held, that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of £500.

Testator devised certain specified messuages and lands, and all other his messuages, lands, tenements, and hereditaments which might not be in his will particularly described or mentioned, to trustees upon certain trusts. The Court declined to decide whether a leasehold house passed under the general words, without directing a case for the opinion of a court

11/1= Hd. 2. p. 279 1.04. 356.

per Cent. Consols. Also, I give to Ariana, wife of -Aickin, Esq., formerly Ariana Shelley, £500. To my godson, John Shelley, £100." [Here followed several other pecuniary legacies. "Also, I give and bequeath to my dear brother-in-law, Sir Timothy Shelley, Bart., and Sir John Shelley Sidney, Bart., all the rest and residue of my ready money, securities for money, and monies in the funds, in trust to invest the same in their joint names, and to pay to or permit and suffer my dear wife Helen, or her agent, for her use, to receive the dividends or interest of the same during her life; and, after her decease, for this further trust, to divide, transfer, and pay the said stocks and monies unto and amongst my cousins, Thomas Marchant, John Marchant, the children of my late cousin William Marchant, and the children of my late cousin Mary Knight, -namely, one equal share to Thomas, one equal share to John, one equal share to the children of William, and the remaining share to the children of Mary Knight." And as to the messuages, lands, tenements, and real estates, he disposed thereof as follows:—He gave and devised unto the said Sir T. Shelley and Sir J. Sidney, and their heirs, all those his two-third parts, and all other his right and interest in and to all those messuages, lands, and tenements, situate at Ifield, in the county of Sussex; also in and to all that messuage, lands, and tenements in Charlewood, in the county of Surrey, with their and every of their appurtenances, either in the said or in any other parishes or places situate and called or known by the name of Westfield, or by whatever other name called or known; also, all that his manor, or royalty, messuages, and hereditaments and castle, situate at Otford, in the county of Kent, with the appartenances; also, all that his messuage with the appurtenances at Chevington, in the county of Suffolk; also his form and lands in Hargrave and Hesset, in Suffolk; also. in Hoo, in Kent, in Ifield, in the county of Sussex, in Charlewood, in Surrey; also, his house and premises in

PARKER V. MARCHANT. PARKER V. MARCHANT. Catherine-place, Bath; and all other his messuages, lands, tenements, and hereditaments which might not be therein particularly described or mentioned, upon the following trusts:—First, for the use of his said wife Helen, for her natural life, and after her decease to the use of the said Thomas Marchant and John Marchant, and the children of the said William Marchant and Mary Knight, in equal shares and proportions, as tenants in common. The testator then bequeathed as follows:—"And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever. And I do hereby constitute and appoint my said wife sole executrix of this my will."

By a codicil the testator bequeathed as follows:—"I give and bequeath to the following persons, who have lived many years in my family; viz. to Mrs. Down, £1000; to Mr. Jones, £1000; to Martha Isgrove, £1000; to the other servants, £500 each. This writing I direct to be taken as a codicil to my will."

The testator died on the 27th of March, 1837. Thomas Marchant died in his lifetime. The bill was filed by the widow against the several other persons interested under the will and against the trustees, praying that the trusts of the will might be declared and carried into execution.

In pursuance of the decree made in this cause in December, 1838, (the form of which, in some important particulars, is commented upon in the judgment in this case), the Master found, amongst many other matters, that the testator was, at the time of his death, possessed of 22,891*l*. 15s. 7d. ready money, the greater part of which consisted of balances in the hands of two banking houses, and the residue of money in his dwelling-house, and in the hands of his agents. The Master also found that the testator was, at the time of his will and of his death, seised of or well entitled to the estates mentioned in his will, all

of which were freehold or copyhold. The Master, however, included a leasehold house of the testator at Brighton amongst the personalty undisposed of. The Master stated, that Ann Relfe, who had been in the testator's service at the date of his codicil, but had quitted it before the testator's death, had claimed a legacy of £500, under the bequest to "the other servants," which claim he had disallowed, but recommended it to the attention of the Court.

1842. PARKER MARCHANT.

The other facts, as well as the principal questions in issue, are stated and commented upon in the arguments and judgment.

Sir Charles Wetherell, Mr. Wilbraham, and Mr. Lovat, for the plaintiff.—First, the words "all my jewels," &c., at the end of the will, constitute a residuary clause. By virtue, therefore, of that clause, Thomas Marchant's share of the bequest of stock goes to the plaintiff. It may indeed be argued that jewels and plate do not assort well with a share in the consols; but the subsequent words, "goods, chattels, and effects," are sufficient of themselves to constitute a residuary clause. Besides, this clause is instantly followed up by the appointment of an executrix. That the words "goods, chattels, and effects," will prima facie carry the residue is evident from the cases of Campbell v. Prescott (a), Michell v. Michell (b), Hearne v. Wiggington (c), Saumarez v. Saumarez (d). In some cases, indeed, those words have been narrowed by circumstances of locality, as in Collier v. Squire (e); but no such circumstances occur in the present case.

Secondly, the testator's debts are, by the express direction of the testator, to be paid out of the Consols and ready money mentioned in the first part of the will, and not out

<sup>(</sup>a) 15 Ves. 500.

<sup>(</sup>d) 4 M. & C. 340.

<sup>(</sup>b) 5 Madd. 69.

<sup>(</sup>c) 6 Madd. 119.

<sup>(</sup>e) 3 Russ. 467.

PARKER 0. MARCHANT.

of the residue. With the exception of the leasehold property and the residuary property given to the wife, the first clause carries the whole of the testator's personal property. That is a strong circumstance to be regarded in construing this part of the will. The testator, also, after directing payment of his debts, "then" gives the Consols and ready money. It may be admitted, that in many cases "then" is considered merely as a word to connect sentences, like the word "item:" but in other cases it has much greater force. Here, the effect of it is to subject the gift of the stock and ready money, and securities for money, to the payment of the testator's debts. After payment of the debts, "then" the "rest and residue" of the stock. monies, and securities, are to go in a certain course. The words "rest and residue" apply only to the property which the testator had before given - not to anything which he mentions afterwards.

Thirdly, the money of the testator in the hands of his bankers at the time of his decease was not ready money, but a debt due to him from his bankers: it therefore belongs to the residue: Carr v. Carr (a); Sims v. Bond (b).

Fourthly, the general words following the devise of the real estates do not comprehend the leasehold house at Brighton: Rose v. Bartlett (c); Thompson v. Lawley (d). The testator resided in that house, and it is impossible he should have forgotten it. The general words only refer to free-holds. [The Vice-Chancellor said, that this question ought probably to be submitted to the decision of a court of law.]

Fifthly, Ann Relfe is not entitled to a legacy: Jones v. Henley (e).

Mr. Bethell and Mr. Boyle, for the defendant John Marchant.—First, there is no residuary clause. The word

<sup>(</sup>a) 1 Mer. 541, n.

<sup>(</sup>d) 2 Bos. & P. 303.

<sup>(</sup>b) 5 B. & Ad. 393.

<sup>(</sup>e) 2 Ch. Rep. 162; R. L. 1685,

<sup>(</sup>c) Cro. Car. 292.

A. fo. 995.

" effects" is one of great elasticity, and must be construed with reference to the meaning of the words with which it is associated. If used in connection with words describing particular things, it means something ejusdem generis. Here the word "effects" is not more extended than "goods and chattels;" for the "goods, chattels, and effects" which are given to the wife—are given to her "as her own goods and chattels for ever." The goods and chattels mean the goods, chattels, and effects, before mentioned. Again, the word "all" does not precede "other." The bequest is. in effect, of these particular and other goods and chattele. Bennet v. Batchelor (a); Rawlings v. Jennings (b); Stuart v. Marquis of Bute (c); Woollam v. Kenworthy (d); Hotham **v.** Sutton (e); Chapman v. Hart (f); Sanders v. Earle (g); Roberts v. Kuffin (h); Hunt v. Hort (i); Sutton v. Sharp (k). The Vice-Chancellor asked whether the dictum ascribed to Lord Eldon, in Hotham v. Sutton, was exactly consistent with other authorities; and he observed, that it was not necessary for the decision in that case. With respect to the cases cited after that case, his Honour said they were all determined either upon the ground of the particular locality of the effects, or upon the circumstance that specific articles were mentioned after the general words.]

Secondly, supposing there is a residuary clause, the money at the bankers does not fall within it, but comes within the meaning of the expression "ready money," used in the earlier part of the will. Those words are put in opposition to "securities for money," and "monies in the funds." They mean monies not in a state of investment. Taylor v. Taylor (1); Vaisey v. Reynolds (m); Collison v.

(a) 3 Bro. C. C. 27.

(b) 13 Ves. 39.

(c) 11 Ves. 657.

(d) 9 Ves. 143.

(e) 15 Ves. 319.

(6) 10 168 019.

(f) 1 Vez. Sen. 271.

(g) 2 Rep. Ch. 98.

(h) 2 Atk. 112.

(i) 3 Bro. C. C. 311.

(k) 1 Russ, 146.

(1) 1 Jur. 401.

(m) 5 Russ. 12.

PARKER 9. MARCHANT. 1842.
PARKER

MARCHANT.

Girling (a). Money at a banker's is a deposit which may be withdrawn at any time, and is therefore ready.

Thirdly, the leaseholds pass under the general words following the gift of the freeholds. Hartley v. Hurle (b); Addis v. Clement (c); Dixon v. Dawson (d); Doe d. Bellasyse v. Lucan (e); Lowther v. Cavendish (f); Turner v. Husler (g); Goodman v. Edwards (h); Judd v. Pratt (i); Pennington v. Pennington (k).

The other question, namely, upon what fund the testator's debts are charged, cannot properly be argued till a construction is put upon the will. There is, however, no foundation for the argument that the general personal estate of the testator is exonerated from payment of his debts merely by force of the ambiguous words "all the rest and residue," &c., following the direction for payment of his debts.

Mr. Simpkinson and Mr. Whatley, for the children of William Marshall.—The charge of debts is upon the aggregate real and personal estate of the testator. There are no words restricting the charge of debts to a particular fund. It is true, that after directing his debts to be paid, the testator gives to his wife a sum in the Consols, which he declares to be part of a larger sum in that stock; and he gives to other persons other sums of stock, which he declares to be other part of his Consols; and after giving several money legacies, he gives "all the rest and residue" of ready money, securities for money, and monies in the funds in a certain manner. But are not the words "rest and residue" satisfied by taking into consideration the testator's previous directions as to the legacies of stock?

<sup>(</sup>a) 4 Myl. & Cr. 63.

<sup>(</sup>b) 5 Ves. 540.

<sup>(</sup>c) 2 P. W. 456.

<sup>(</sup>d) 2 S. & S. 327.

<sup>(</sup>e) 9 East, 448.

<sup>(</sup>f) 1 Eden, 99.

<sup>(</sup>g) 1 Bro. C. C. 78.

<sup>(</sup>h) 2 Myl. & K. 759.

<sup>(</sup>i) 15 Ves. 390.

<sup>(</sup>k) 1 Ves. & B. 406.

If so, there is nothing to take this case out of the general rule, that, in order to affect a particular part of a testator's estate with the payment of his debts and legacies, they who rely on that construction must shew the clearest intention to that effect on the part of the testator. PARKER 0.

MARCHANT.

In Choat v. Yeats (a), where the debts and legacies were charged on a particular fund, the decision proceeded on the circumstance of the direction for payment of the debts and legacies being included in the gift of the particular fund. Here the direction is general, and independent of the gift of the particular fund.

With respect to the words "ready money," they clearly comprehend what a man has at his banker's. [The Vice-Chancellor.—Suppose there was an accretion of stock between the time of the testator's will and his decease, would such accretion pass by his will?] Upon general principles, the will must be intended as speaking at the testator's death. He does not speak of the stock or ready money which "I now possess." Ready money, unless there be any thing in the context of the will to the contrary, must be money which is ready at the testator's death. [The Vice-Chancellor.—Suppose he had bequeathed all his policies of assurance.] It is submitted, that, under the words securities for money, all the policies of assurance which he had at the time of his death would pass.

Mr. Kenyon Parker and Mr. Pitman, for the assignees of John Marchant, and for the incumbrancers on the shares of William.

Mr. Koe and Mr. Hood, for the children of Mary Knight, and Mr. Russell and Mr. Tripp, for other parties, cited, with reference to the question, whether the will carried the accretions of stock between the date of the testator's

PARKER

U.

MARCHANT.

will and his death, All Souls' College v. Coddrington (a); Gayre v. Gayre (b); Masters v. Masters (c); Dean of Christchurch v. Barrow (d); and Sheffield v. The Earl of Coventry (e).

Mr. Roupell, Mr. Wilcock, Mr. Glasse, Mr. J. H. Hall, Mr. Stone, Mr. Lewin, and Mr. Dumergue, appeared for other parties.

Mr. Walpole, for Ann Relfe.—In Jones v. Henley, which has been cited for the plaintiff against the legatee, Ann Relfe, the words were "all mu servants." an expression which certainly might apply to those servants only who were in the service of the testator at the time of his death. But in Sherer v. Bishop (f), in which the bequest was to the six children of John Sherer, only the six who were living at the date of the will were held entitled. And in Garratt v. Niblock (g), in which the bequest was to the testator's "beloved wife," it was held that the first wife was intended, and that the words would not extend to a second wife. See also Comyns's Digest, Chancery, 3 (Y.) 16, pl. 1. Here the testator, after bequeathing legacies to certain servants by name, who were then living with him, adds, "to the other servants £500 each." That also refers to servants who were then living with him. No condition of continuing service is annexed to this bequest.

Sir Charles Wetherell, in reply.

March 8th.

THE VICE-CHANCELLOR.—The questions in this case are upon the will and codicil, dated respectively in 1829 and 1830, of Mr. Parker, who died in the year 1837. It

<sup>(</sup>a) 1 P. W. 597.

<sup>(</sup>e) 2 Russ. & M. 317.

<sup>(</sup>b) 2 Vern. 538.

<sup>(</sup>f) 4 Bro. C. C. 55.

<sup>(</sup>c) 1 P. W. 424.

<sup>(</sup>g) 1 Russ. & M. 629.

<sup>(</sup>d) Ambl. 641.

may be convenient in the first place to dispose of the codicil by stating my opinion that the legacies given by it are general pecuniary legacies, payable in the ordinary way out of the general personal estate, and not otherwise; and that the legacy claimed by Ann Relfe, under the bequest "to the other servants" of £500 each, is due. is admitted to have been within that description when the codicil was made; for the "many years' service" is not contended to have applied to "the other servants." subsequently quitted the testator's service in his lifetime, did not return to it, and was, therefore, argued to have lost her legacy. The codicil does not, in express terms, annex to the gift the condition of continuing service. has not been argued to be capable of extension to servants, if any, who subsequently to the codicil entered his service for the first time, though continuing in his service at his death. On the other hand, the circumstance that he has described the legatees by their employment, and not by name, does not, as I conceive, import that the employment and character must continue. The case decided in 1685. which was cited at the bar, did not turn upon the same language as that now before me. I think that this disputed legacy ought to be paid - a conclusion probably agreeable to the civil law; for a law of Ulpian, in the Pandects, Lib. 34, tit. 5, art. 19, De rebus dubiis, provides thus:-" Si cognatis legatum sit, et hi cognati quidem esse desierint, (this might be through emancipation), in civitate autem maneant, dicendum deberi legatum; cognati enim testamenti facti tempore fuerunt." Ulpian goes on to say--- " Certe si quis testamenti facti tempore cognatus non fuit, mortis autem tempore factus est per adrogationem, facilius legatum conse-How far this latter position is one adopted by the English law it is unnecessary now to consider. The former is, I conceive, in conformity with our principles.

The first point upon the will that it may be right to

PARKER 9. MARCHANT. PARKER 0.

MARCHANT.

mention, is the question, whether the testator has disposed of the beneficial interest in the general residue of his personal estate, or has so far died intestate. This turns upon the meaning to be attributed to the words "goods, chattels, and effects," having regard to the position in which they are found in the will; and having regard, also, to the whole contents of the will. Lord Cottenham, in Saumarez v. Saumarez (a), expressed his assent, and I agree with him in assenting, to a general rule of construction, as laid down or recognised by Lord Eldon in Church v. Mundy (b). thus: - " It is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary." The words "goods, chattels, and effects," which the bequest contended to be residuary contains, or any of them, are terms that, in their proper sense and nature, are sufficiently large to include and pass the absolute interest in the whole personal estate.

But a will may be so worded as to shew that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense; and when this appears, the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction, to shew that a rational interpretation of the will requires a departure from that which ordinarily and *prima facie* is the sense and meaning of the words. Such I take to be in substance the rule to be collected from all the authorities, and to this test the gift in question must be subjected.

The testator, after directing the payment of his debts, and making bequests of stock and money to his wife, and other persons, (which exhaust all the ready money that he might have at his death, and at least all the securities for money and monies in the funds that he had when he made his will), and disposing of his landed property, (in which the wife takes a life interest, and which disposition of the landed property is asserted on one hand and denied on the other 'to have included his chattel leasehold property), concludes his will thus:-" And I do further," &c. &c. [His Honour here read the last paragraph of the will.] This is the whole of the clause now in question. And it is to be observed-first, that it does not contain any limitation in point of locality-any reference to place: secondly, that the larger and generic terms, "goods, chattels, and effects," follow the specific terms, "jewels, plate, linen, china, carriage, wines," and are the last-enumerated subjects of the gift: thirdly, that there is not, in any subsequent part of the will, or in the codicil, any disposition or expression denoting a belief in the testator's mind, that there was anything not expressly given to some other person which the clause in question would not carry to the wife: fourthly, that the gift to her, followed by her appointment to the sole executorship, and by nothing else, is in that part of the will where, according to habit and custom, the disposition of the residue, if any, would be expected to be These considerations, each of more or less imfound. portance in construing the instrument, are only met by a rule, certainly of frequent, but not of universal application, confining such a general term as "goods," "chattels," or "effects," following a particular enumeration of specified articles to things ejusdem generis with the articles speci-To this rule Lord Eldon alludes in the cases of Stuart v. Lord Bute and Hotham v. Sutton, and its recognition is of frequent occurrence elsewhere in the books. That it is not of universal application is clearly shewn by VOL. I. N. C. C.

PARKER 9.

PARKER V. MARCHANT.

several authorities, of which some have been mentioned in the course of the argument. In the case of Arnold v. Arnold (a), Lord Cottenham, then Master of the Rolls, thus expresses himself on the subject:-" The question, then, is, whether, assuming this to be the right construction, the expression 'my wines and property in England,' will not include every description of property found to be locally situate in this country, or whether there be any rule which necessarily limits that property to articles of the same kind with the subject matter of the previous gift. That the mere enumeration of particular articles, followed by a general bequest, does not of necessity restrict the general bequest, is obvious; because, as has been stated, a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted. Clearly, therefore, in the ordinary case, the gift of the wines would not be limited by the occurrence of the subsequent word, 'property,' which, be it observed, is as large and comprehensive a term as can possibly be used. The question, then, remains, whether the limit, in point of place, imposed by the testator on the extent of the bequest, ought to make any difference; and I can find neither reason nor authority for holding that it should. Indeed, I have been unable to discover any instance in which the word 'property' has been confined to articles of the description before enumerated, unless where other expressions occurred, from which it was clear that the word was not there used in its ordinary sense." Sir William Grant, in Campbell v. Prescott (b), thus expresses himself:—" The next question is, whether the surplus belongs to the next of kin, or to the residuary legatees; that is, whether the latter takes it by the express disposition; and I think they do so take. There is no case for the restrictive sense which the grandchildren put on the general words 'all

<sup>(</sup>a) 2 Myl. & K. 372, 373.

my effects whatsoever.' Lord Mansfield says, the word "effects" is equivalent to property or worldly substance. The plaintiffs are, therefore, entitled to a decree." And in Michell v. Michell (a), Sir John Leach savs:-"The word 'effects,' used simpliciter, will carry the whole personal estate, as a gift of 'all my effects' without more: but it is frequently used in a restrictive sense, meaning goods and moveables, as in the common expression of 'furniture and effects.' In every case, the Court has to collect from the context the particular sense in which the testator has intended to use it. In Campbell v. Prescott. there were added to the word 'effects,' 'of what nature or kind soever;' and this addition excluded its restrictive sense. And it appears to me, that the words which follow the word 'effects' in the present case, 'that he shall die possessed of,' lead to the same conclusion." Acknowledging. as I do, the principles recognised in these three cases, and in Church v. Mundy, and recollecting particularly that prima facie the words "goods, chattels, and effects," are general and unlimited expressions as applied to personalty, what judicial ground have I for saying that an intention to use them in any other sense is apparent on this will? Conceiving the general interpretation to be not only consistent with propriety of language and expression, but to be at least as probably conformable with the testator's views and intentions to be collected from the whole will as any other construction. I consider myself not authorized to depart from it; and, therefore, not authorized to accede to the argument which contends against the wife's right to the residue: I declare it, accordingly, to belong to the plaintiff, her executor.

Before leaving this part of the case, it may be remarked, that Sir William Grant's judgment in Rawlings v. Jennings (b), given by Mr. Vesey ex relatione, contains this passage:-"The second question arises on the widow's

Parker MARCHANT.

1842.

<sup>(</sup>a) 5 Madd, 71, 72.

PARKER

O.

MARCHANT.

claim of the whole residue of the personal estate, as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles ejusdem generis with those specified in the preceding part of the sentence, namely, household furniture." As the will in that case is stated in the report, and in the Registrar's book, the gift forming apparently the reason of the judgment as to the import of the word "effects" does not appear. The will, however, may have contained more than the report and the Registrar's book shew. Certainly, there were bequests to various persons after the bequest to the wife of the "household furniture and effects." Perhaps, also, in that case the word "household" may be considered to have belonged to the word "effects" as much as to the word "furniture."

The next question is, whether the plaintiff is right in contending that the testator's debts and the pecuniary legacies given by the will are payable not in the ordinary course but primarily or solely out of the "ready money, securities for money, and monies in the funds." Here, also, the general rule, which in this instance is against the plaintiff's claim. must apply, unless upon the will and codicil, or one of them, he can shew a contrary intention manifested. The word "then" and the words "rest and residue" are said by him to manifest such an intention, and the case of Choat v. Yeats (a) is cited in support of the proposition; which, I think, however, he does not as to the debts establish. The first passage of the will makes the real estate liable as equitable assets to the payment of all the debts. which otherwise it would not have been. The real estate, however, is not by the word "then" or otherwise charged primarily or pari passu with the personalty not specifically

bequeathed, but is only made liable in case of necessity in its usual rank and order. So, as to the "ready money, securities for money, and monies in the funds," of which the disposition is specific, or in the nature of a specific bequest. These the testator could not by law, as against his creditors, exempt from his debts. He could not give them except subject to his debts; and the word "then" appears to me to indicate that only; or to shew merely that, without meaning to disturb or vary the usual order of administration, he recognised the priority of his creditors over the objects of his bounty. And as to the words "rest and residue," if they have any reference to the debts at all, I think that they do not carry the matter farther. I find it, at least, impossible to say that the plaintiff has done more than bring this point into doubt, if he has done so much; and he must do more before he can ask the Court to depart from a general rule. My opinion, however, as to the pecuniary legacies given by the will is different. To these the specifically bequeathed personalty could not in any order under any circumstances be liable, unless made so by special provision for the purpose. The will, however, as I read it, recognises these legacies as matters of deduction from the ready money, securities for money, and money in the funds. If so, in what order and to what extent? Looking at the whole will, the particular part of it in which these legacies are found, and the language of the final bequest to the testator's wife, I am of opinion, that there is to be found in the instrument an intention manifested that the "ready money, securities for money. and monies in the funds," should be primarily, if not solely, (the amounts, as I understand, render it immaterial whether primarily or solely), charged with these legacies; and I must declare accordingly. The lapsed share of the property thus charged must bear its portion, but no more than its portion, of the burthen.

The next question made is as to the meaning of the term

PARKER

9.

MARCHANT.

PARKER 9.
MARCHANT.

"ready money." That the will refers to such ready money as there might be at the testator's death, and not merely to such ready money as he had at the date of the will, is, I think, plain from the nature of the subject, and agreed on all hands. The contention has been, whether certain sums mentioned in the Master's report do or do not from their nature fall under the description of "ready money."

Upon the 1161. 12s. cash in the house, there has been and can be no question. Clearly, it is ready money. It is, I think, on the other hand equally clear that the debts due to the testator at his death from his agents and other persons, however safe, and with whatsoever facility obtainable, were not included under that description, with the exception only of the two sums of 60241. Os. 11d. and 16,6151. 15s. 1d. The former of these is described in the report as the balance at the testator's death in the hands of Messrs. Hobhouse & Co., the testator's bankers at Bath. The latter is described in the report as the balance due to the testator at his death from Messrs. Child & Co., his bankers in London. The argument has proceeded on the basis that these two sums were ordinary bankers' balances on banking accounts of the usual description, kept in the usual manner, that neither of them bore interest, and that in the customary mode it was competent to the testator at any moment to have drawn cheques pavable to the bearer on demand for the whole. He had a residence at Bath, but it seems, none in London or its vicinity. main dispute on this part of the case has been whether these two sums are to be considered as "ready money." According to the decision in Carr v. Carr (a), they would have passed, or might have passed, under a bequest of debts due to the testator. That I think is not conclusive against their capacity of passing under a bequest of ready money.

Undoubtedly, an ordinary balance in a banker's hands

is in a sense a debt due from him—certainly, he may be sued for it as for a debt. But it may be equally true that in a sense it is ready money; and, if that description may in general be justly held applicable to it, possible difficulties, not existing here, which may exist in other cases, s of a bequest in the same will of the debts due to the testator to one person, and of his ready money to another. without an explanatory context, or of interest being allowed by the banker, or of a contract that unless upon a certain notice the balance should not be reduced below an agreed amount, or of acceptances by the banker for the customer, not at maturity at the latter's death, or of drafts upon the banker, drawn by the customer, but not at maturity, not presented, or not paid, ought not to prevent the Court from giving full effect, according to a fair interpretation of the will, to the language which the testator has used. The term "debt," however technically correct, is not colloquially or familiarly applied to a balance at a banking-house. No man talks of his banker in that character being indebted to him. Men, speaking of such a subject, say they have so much at their bankers', or so much in their bankers' hands,—a mode of expression indicating virtual possession rather than that right to which the law applies the term chose en action. Again, a man having not enough in his purse or in his house to pay a tradesman's bill for which he is asked, but having a large balance at his bankers', says that he has not so much about him, or that he has not so much in the house; he does not say that he has not so much ready money. Agreeing that this term is applicable to money in the purse, or the house, I cannot agree that it is confined to money so placed. Money paid into a banking-house, in the ordinary mode, is so paid for the purpose of being not safe merely, but ready as well as safe—available upon the instant for any exigency or object which may arise; according to a definition of the word "bank," in a book of high character-"a place where

PARKER v.
MARCHANT.

PARKER

O.

MARCHANT.

money is laid up to be called for occasionally." It is true. that the deposit is one which the banker is not bound to return in specie; that is, he satisfies the engagement if he has always ready for his customer a sum equal to the amount deposited. That, however, I think too thin and narrow a distinction to render the banker more in substance than a depositary, though technically, a debtor as well as a depositary. I consider, therefore, these two balances as ready money—a conclusion at which, as it differs, though not necessarily from the decision, yet, from an opinion expressed in Carr v. Carr by one of our greatest judges, I have arrived, not without feelings of embarrassment and distrust. But it is my unavoidable duty to express and act upon my own opinion in the present case, however slightly I may and must estimate it in comparison with that of a man such as Sir William Grant. the relief, certainly, of considering that the view which I take seems to be in accordance with the impression of two eminent judges-I mean Sir John Leach and the present Master of the Rolls; and that the plaintiff has the right of bringing my judgment under the review of the Lord Chancellor.

As to the testator's securities and funded property, in answer to an observation which I made during the argument, it was stated by the plaintiff's counsel, that he claimed, as part of the residue, so much of them as subsequently to the will, or subsequently to the codicil at least, had been acquired by the testator. The point, however, was not much argued; and were it in my judgment incumbent on me to form and act upon an opinion respecting it, I should desire a further and full argument upon it. It appears, however, that throughout the cause, from its original commencement until after the further directions had been opened in this Court, the original plaintiff, the present plaintiff, and all the other parties, have proceeded under the impression that the testator, in bequeathing his

- 25.64.CC 279.4.

securities for money and monies in the funds, meant to bequeath, and did bequeath, all such property of either description, as he might have at his death; and the decree takes the same view: for though it directs the Master, in taking the account of the personal estate, to distinguish such part of the testator's estate as, at the respective times of making his will and of his death, consisted of leasehold property, yet the immediately succeeding sentence is thus, -" And it is ordered, that the said Master do also distinguish such part of the said testator's estate as at the time of his death consisted of ready money, securities for money, and monies in the funds, from the other parts thereof."-a direction materially different from that respecting the leasehold estate: and though the Master is authorized to state any circumstances specially on all or any of the inquiries, the decree does not direct him to find what securities for money, monies in the funds, or funded property the testator had at the date of his will, or of his The report, accordingly, though possibly furnishing that information indirectly as to securities for money, does not find or shew what, if any, monies in the funds or funded property the testator at either of those dates had. Certainly the decree declares the inquiries, which it directs to be without prejudice to any question as to the construction of the will and codicil; but I must suppose, that had the Court which pronounced it considered that the bequest of the testator's securities for money and monies in the funds might, by possible construction, or ought to be, confined to such of those particulars as he had at the date of his will, or of his codicil, the decree would not have contained merely the inquiries which it does. I must suppose that the Court considered a full answer to those inquiries to be all that would be necessary to enable the estate to be administered on the further directions. Under the circumstances, I do not consider it incumbent on me to open, or to treat as otherwise than settled, any question as

PARKUR 9. MARCHANT. PARKER 9. MARCHANT. to the construction of these words. But, in directing the estate to be administered, as for these reasons I do, upon the footing that the words "securities for money and monies in the funds" mean all such securities for money and funded property as the testator had at his death, I desire to be understood as not declaring or intimating, and, indeed, as not having formed any opinion of my own, whether that is or is not the true construction of the will. It will, of course, be competent to the plaintiff, if so disposed, to have the decree of the Vice-Chancellor of England and my decree, or either of them, reheard before the Lord Chancellor.

In support of the construction as to the fund for paying the debts, and as to the meaning of the term "ready money," for which the plaintiff has contended, it was urged by Sir Charles Wetherell in his able argument, that a different construction, as matters stood when the will was made, (the lapse having been a subsequent accident). would impute to the testator the intention in substance of leaving to his wife neither plate, nor jewels, nor residue of any kind. I may, however, in the first place, observe, that I very much agree with Sir Thomas Plumer, when, in Choat v. Yeats (a), he says,—" It is always the safest mode of construction to adhere to the words of the instrument. without considering either circumstances arising aliunde. or calculations that may be made as to the amount of the property, and of the consequences flowing from any particular interpretation." Secondly, I answer, that the plaintiff, if able to obtain, has not obtained for the Court, and the Court does not possess more than partial and defective information respecting the amount and state of the testator's debts, property, and circumstances, at the date of his will, or at the date of his codicil. If the Court could under any circumstances act, it has not here the means of acting on any notion of what the testator had or owed at either of those periods, or contemplated as the probable state of his affairs at his death. PARKER

U.

MARCHANT.

As to the chattel leasehold property, alleged by some of the defendants, and denied by the plaintiff, to have been included in the gift made by the will to the trustees, Sir Timothy Shelley and Sir John Shelley Sidney, my opinion remains, that the question, which is merely legal, is not sufficiently clear of doubt to render it improper for me to ask the assistance of a court of law upon it. If the facts are, as I collect, agreed, a case will be preferable to an The case should state, as I understand the facts to be, that the real and leasehold properties of which the testator was seised and possessed respectively at the date of his will, were exclusively those mentioned in the 9th and 5th schedules to the report; that he continued seised and possessed of them until and at his death, and that he did not acquire any additional real or leasehold property in the interval. The schedule of the real property without its heading, the schedule of the leasehold property without its heading, and a copy of the will and codicil, should be embodied in the case; and it should state the date of the testator's death, and that without prejudice to any question of construction the executrix assented to all the bequests made by the will. The question in the case will be, whether the leasehold properties mentioned in the 5th schedule, or either and which of them, passed under the will to Sir Timothy Shelley and Sir John Shelley Sidney.

The costs of the suit of all parties to the present time must be paid out of the residuary personal estate, except that so far as the costs have been increased by any shares of the property having been assigned or incumbered, that addition to the costs must fall wholly on the shares so assigned or incumbered respectively. Let minutes be prepared, as probably they can without any difficulty be, upon the basis of what I have now said, and I will hear them

1842. MARCHANT.

spoken to on this day week. On which occasion, if any question shall be made whether the bequest of the testator's securities for money carries or includes the interest upon them due at his death, I will hear that question, (as it has not yet been) argued. My present impression is, that the interest should go with the principal.

It may also be convenient, possibly, to the bar to mention, that among the cases, besides those cited in the argument, at which I have looked, are these :—Phillips v. Eastwood (a); Browne v. Groombridge (b); Hawley v. Cutts (c); Harcourt v. Morgan (d); Doe d. Evans v. Evans (e); Edwards v. Barnes (f); Jones v. Curry (g); Webb v. Honnor (h).

- (a) Ll. & G. temp. Sugd. 270.
- (b) 4 Madd. 495.
- (c) 2 Freem, 24.
- (d) 2 Keen, 274.

- (e) 9 Ad. & Ell. 719.
- (f) 2 Bing. N. C. 252.
- (g) 1 Swanst. 66; 1 J. Wile. 24.
- (4) 1 Jac. & W. 352.

March 3rd.

## CALDECOTT v. CALDECOTT.

u 435. Testator gave to be from time

.500

JOHN CALDECOTT by his will gave and devised to his his personal es- wife in addition to the jointure secured to her by her martate to his executors, in trust, riage settlement, all that his manor of Little Lawford, and

to time, as they should think best, turned into monies for the payment of his debts and legacies; and subject thereto he directed them from time to time to invest the same, with all accumulating produce, in the purchase of other lands, to be situated as conveniently as might be to certain real estates devised by him in a former part of his will; and his will was, that such purchased premises should be conveyed to the same uses &c. as his devised lands; and that the interest and produce of his said personal estate, which should from time to time arise and be made before and until the said money should be so invested, should be paid to the person who would be entitled, under the trusts of his will, to the rents and profits of the said premises if would be entitled, under the trusts of his will, to the rents and profits of the said premises it actually purchased, as an addition thereto:—Held, that, subject to the usual provisions for the payment of the testator's debts and legacies, the tenant for life was entitled to the income, as from the testator's death, of such parts of his personal estate as were at the time of his death, and had since remained in such investments as would have been recognised by the Court as proper; but that, with regard to such parts of his personal estate as were at the time of his death, and had since remained in such investments as could not be so recognised, the rule applied by Lord Eldon to leasehold property in Gibson v. Bott, (7 Ves. 89), and by Sir W. Grant to copyhold in Walker v. Shore, (19 Ves. 387), must be applied in this case.

An express direction, by a testator, for the conversion and for investment of his personal property. From time to time at trustees may think fit, will not necessarily present the overstion

property, from time to time as trustees may think fit, will not necessarily prevent the operation of the general rule, that where personal property is given in a series of limitations, it shall be invested in such securities as are approved of by a court of equity for the benefit of parties interested in remainder after the death of the tenant for life.

1a. fr. 75%.

1 Lines 247

his right of fishery in the river Avon there; and all that his dwelling-house called Holbrook Grange, with the appurtenances and certain pieces of land within the manor of Little Lawford, (which were specified in the will), and all those his grounds situate in Long Lawford, in the parish of Newbold-upon-Avon, which he purchased of the heirs of Thomas Bennett, and certain open grounds there, (all which premises, together with other lands, were in his own occupation), and also a certain messuage and cottages and close in Long Lawford, in the occupation of certain persons named, to the intent that his wife might have the use and enjoyment of the rents and profits of the said premises during her life, in case she should so long continue his widow, and should like to make the said Grange her principal place of residence; but in case she should prefer leaving the same and living elsewhere, then he gave to her (in lieu of his dwelling-house, lands, and premises), during the remainder of her life and state of widowhood, an annuity or yearly rent-charge of £400, to be payable out of his said estate; and subject as aforesaid, he gave and devised his said manor or royalty, right of fishery, mansion-house, grounds, and hereditaments, with his water corn-mill, and other his lands and premises within the several parishes, hamlets, and liberties of Newbold-upon-Avon, Long Lawford, Little Lawford, Kittle Harborough, and in Rugby, Bilton, and Bretford, in the parish of Wolston, all in the said county of Warwick, to the use of his nephew Charles Marriott Caldecott for life, with remainder to trustees to preserve the contingent remainders, with remainder to the first and other sons of the said C. M. Caldecott successively in tail male, with remainder over in favour of the other nephews of the testator, in strict settlement. And the testator gave to his wife to her sole use certain specified books, a pianoforte, his carriages, horses, and if she had occasion for them, his farming implements, and also his wine and other liquors, and all eatables and such-like perishable

CALDROOTE 9.

1842.
CALDECOTT

articles that might be in and about his dwelling-house and premises, and also the disposal, as she should think proper. of his clothes and wearing apparel; he also gave to his nephew John Thomas Caldecott his gold watch, and all such other articles for such like use or ornament as he, with the approval of his the testator's wife, should be desirous of possessing; and as to his books, pictures, plate, linen, china, household goods and furniture, and all other his personal chattels in and about his dwelling-house or its appurtenances, and not disposed of by his will, or any codicil or codicils belonging thereto, he gave the same to his executors, but in trust only, and his desire was that they should be used and continued as heir-looms to his dwelling-house, as far as the same by the rules of law might be permitted. The testator then, after giving several small legacies to his servants and labourers, gave and bequeathed to his wife to her own use the sum of £1000, of which he wished the first half to be paid her as soon as conveniently might be after his decease, and the remaining half within twelve months next after his decease; and he declared that she should be entitled to all such canal navigation shares which should at the time of his decease be standing in her name in trust for her; and in case his wife's income from the canal property which she should possess at the time of his decease should in any year during her widowhood fall short of its then present estimated income of £320 per annum, he thereby directed that such deficiency should be from time made up to her out of the residue of his personal estate, and to be payable to her by his executors after named. The testator then, after bequeathing several pecuniary legacies, proceeded as follows:--" I also give to my executors and trustees eight of my Grand Junction Canal Shares, to the intent that they shall receive and pay the dividends and annual produce thereof to my said wife. or otherwise permit her to receive the same so long as she shall continue my widow, and shall choose to make Hol-

brook Grange her principal place of residence, to the intent the same may be applied in repairing and keeping in neat order and improving condition my said dwellinghouse and its appurtenances, as well as the several walks and plantations belonging to it; and subject thereto, my will is, that my said canal shares shall be deemed part of my personal estate, and shall be disposable as such: and as to the residue of my personal estate. I give the same to my executors in trust, to be by them from time to time as they shall think best, turned into monies for the payment of my debts and legacies, as well those given by this my will, as those which I may hereafter give by any codicil or codicils; subject thereto, I direct my said executors and trustees from time to time to lay out and invest the same, with all accumulating produce, in the purchase of other lands and hereditaments, to be situated as conveniently as may be to my said estates in the parish of Newboldupon-Avon; and my will is, that all such purchased premises should be conveyed to the same uses, and under the same limitations and powers, or as near thereto as the then state of circumstances will admit, as my present lands and hereditaments are limited to; and my will further is, that the interest and produce of my said personal estate which shall from time to time arise and be made before and until the said monies shall be invested, shall be paid to the person or persons who would be entitled under the trusts of this my will to the rents and profits of the said lands and hereditaments, if actually purchased, and as an addition thereto. And I hereby nominate and appoint my said dear wife Ann Caldecott during her widowhood, and my said nephew John Thomas Caldecott, and the said Charles Marriott Caldecott, from the time he shall return into this country from his present residence in the East Indies, joint executors of this my will."

The testator made several codicils to his will, which did

1842.
CALDECOTT

CALDECOTT.

1842.
CALDECOTT

CALDECOTT.

not affect the question now before the Court, and died on the 10th October, 1839.

The bill was filed by Charles Marriott Caldecott against Ann Caldecott, John Thomas Caldecott, and the first tenant in tail, charging that the testator had left a large residuary personal estate, which ought to be laid out in the purchase of lands, to be settled to the same uses to which the testator's lands and premises in the parishes of Newbold-upon-Avon, Long Lawford, &c., were limited by the general devise contained in the said will; that the plaintiff as tenant for life of such lands and hereditaments under the said will, was entitled to the income of the said testator's residuary personal estate to arise during his life, or until such purchases as aforesaid could be made; that the testator's residuary personal estate consisted in part of stocks, funds, and securities, shares in canal and other companies, and other premises which had produced income since the testator's death, and that such income ought to be paid to the plaintiff; and further charging that the messuages and hereditaments devised by the will to the testator's widow for life or widowhood, were by no means the principal part of his estates in Newbold-upon-Avon, and that the plaintiff was tenant for life of by far the greater part of such estates under the general devise.

The bill prayed that the will and codicils of the testator might be established, and the trusts thereof carried into execution: that the necessary accounts might be taken, and that the plaintiff might be declared entitled from the testator's decease to the income of the testator's residuary personal estate during his life, or until the same should be laid out according to the directions of the will.

The cause was heard before Lord Cottenham, C., on the 6th February, 1841, when it was declared, that, according to the true construction of the will, the residue of the testator's personal estate ought to be laid out and invested in

the purchase of hereditaments, to be situated as conveniently as might be to the testator's estates in Newbold-upon-Avon, and to be settled to the same uses as those estates stood limited to by the general devise. And after provisions made for taking the usual accounts in an administration suit, it was by the decree ordered, that the Master should ascertain and state of what the residuary estate of the testator consisted, and what part thereof consisted of principal, and what part of income accrued since the testator's death; and he was to distinguish what part of such income accrued during the first year after the testator's decease, without prejudice to any question touching such income.

CALDECOTT

The Master made his report, in the seventh schedule of which he set forth an account of such part of the testator's residuary personal estate as appeared to him to consist of principal, and he found the net amount received on account of income on such residuary personal estate during the first year after the testator's death to be £1903, and the net amount of income subsequent to such first year to be £1807.

The seventh schedule of the Master's report comprised shares in various canals, several life and fire insurance shares, bank stock, three legal mortgages, and an equitable mortgage on land, several mortgages on turnpike tolls, and a promissory note. The promissory note and some of the canal shares were stated by the Master to be of no value.

From another schedule to his report, it appeared that some of the canal shares had been sold.

The cause now came on to be heard on further directions.

Mr. Koe and Mr. James Parker, for the plaintiff.—The plaintiff is entitled from the testator's death to the whole actual income of the residuary estate, in whatever fund it is invested, until a conversion of it takes place. The gift

1842. CALDECOTT CALDROTT.

to him is a specific legacy of the income of the personalty, until it is laid out in land; and the case comes within the observations of Lord Cottenham in Pickering v. Pickering (a), which are to the effect, that, where there is a clear intention on the face of the will that the tenant for life shall enjoy the income, the Court will permit him to do so, though at the expense of the remainder-man. Howe v. Lord Dartmouth (b) proceeded on the absence of any declared intention of the testator on this point. Here the testator directs expressly that the interest and produce of his personalty, before any investment in land shall be made, shall be paid to the person or persons who would be entitled to the rents and profits if the investment were actually made. [The Vice-Chancellor here mentioned Angerstein v. Martin (c), and observed, that he never was satisfied that in that case Lord Eldon meant to give the tenant for life the income of the Russian bonds. Honour also referred to Gibson v. Bott (d) and Dimes v. Scott (e)]. In Dimes v. Scott, there was a direct trust for investment, and no gift of any part of the income till the investment was made. Here a conversion is directed, but for a special and particular purpose only. The testator gives his residue to his executors, to be from time to time converted into money for the payment of debts and legacies, and subject thereto, he gives them a discretion from time to time to invest the money in the purchase of land. Then there is a gift of the income before the time appointed for the investment, a circumstance which distinguishes this case from many others, and relieves it of the difficulty which occurred in Dimes v. Scott, and La Terriere v. Bulmer (f), as to the disposal of the income during the first year after the testator's death. Besides, the interest

<sup>(</sup>a) 4 Myl. & C. 289; 2 Beav. 31.

<sup>(</sup>d) 7 Ves. 89. (e) 4 Russ. 195.

<sup>(</sup>b) 7 Ves. 137.

<sup>(</sup>c) Turn. & Russ. 232.

<sup>(</sup>f) 2 Sim. 18.

given to the tenant for life, is not the interest of money, but the interest of the testator's personal estate. The testator had in his mind something contradistinguished from money. It is unnecessary to consider what might have been done with wearing out securities in the present case. There are no leaseholds, or other securities of that nature. The canal shares are a permanent fund, and the testator. by a clause in his will, prior to the residuary clause, expressly directs that certain canal shares shall remain in their then state of investment for the benefit of the widow. It is clear, therefore, that he meant that this part of his estate, at least, should remain unconverted, and no part was to be converted except at the discretion of the trustees. They were to convert "from time to time." Some objection may perhaps be made to this construction, arising from the words "accumulating produce." But those words may well apply to such parts of the testator's property, as, according to the Master's finding, produce no income. At all events, they cannot apply to the income of his personal estate generally, because that is bequeathed by the subsequent clause.

Upon the question, from what time the enjoyment of the income by the tenant for life commences, the cases appear to resolve themselves into two classes. One is, where there is an express direction to convert and invest, but where, if the will be taken literally, there is no gift until investment, the testator being silent as to the disposal of the income between his death and the time of conversion. In such cases, the gift arises by implication, the property being considered as converted at the end of one year from the death of the tenant for life: Gibson v. Bott (a). [The Vice-Chancellor.—It does not appear from the report of that case, what interest the tenant for life was held to take in the property, other than the leaseholds, between

CALDECOTT

CALDECOTT.

CALDECOTT U. CALDECOTT.

the testator's death and the conversion (a).] The other leading authorities of this class are Taylor v. Hibbert (b), La Terriere v. Bulmer (c), Vickers v. Scott (d), and Taylor The Vice-Chancellor.—Does a direction to v. Clarke (e). invest do more than the law would effect without such a direction? Is there any real distinction between the cases on The distinction was acted upon in Alcock v. that point? Sloper (f), and seems to have been recognised in Douglas v. Congreve (g). There it was held upon the express terms of the will, that the tenant for life was entitled to the income of the residue, as it stood invested at the death of the testator, for the year succeeding his death. Vice-Chancellor.-In Taylor v. Clarke, the Vice-Chancellor Wigram expressed his opinion that Douglas v. Congreve and Dimes v. Scott could not stand together.] those cases there was a difficulty arising from the Court having to deal with an implication. But that difficulty does not exist here, because here the testator expressly gives the income till the investment takes place.

The other class of cases is that of which Howe v. Lord Dartmouth is the principal, in which there is a gift of the

(a) Nor does it appear from the Registrar's book. The following is part of the decree :-- " His Lordship doth declare, that the tenants for life of the property which the testator, Thomas Dowson, by his will directed to be converted into money as soon as conveniently might be after his decease, are entitled to the interest upon £4100 Bank £3 per Cent. Annuities, and on £12,000 Reduced Annuities, admitted to be the produce of such property, from the time the same were respectively purchased; and doth order and decree it to be referred to the Master to set a value on the leasehold property of the said testator remaining unsold, as the same was at the time of the death of the said testator, and compute interest thereon at the rate of £4 per centum per annum from that time; and it is ordered that the said Master do take an account of the personal estate of the said testator, not specifically bequeathed, come to the hands of the plaintiffs, and to the defendants Henry Bott, &c." R. L. 1801, A. fo. 1030.

- (b) 1 J. & W. 308.
- (c) 2 Sim. 18.
- (d) 3 M. & K. 500.
- (e) 1 Hare, 161.
- (f) 2 M. & K. 699.
- (g) 1 Keen, 410.

residue to parties in succession, the will being silent as to conversion, and the Court is called upon to say whether the whole fund is to be melted, to use Lord Eldon's expression, or to be enjoyed specifically. The law is settled in those cases, that the tenant for life is entitled to the income in some shape or other from the death of the testator. That was doubted in Sitwell v. Bernard (a), but is now settled. It has been decided in later cases that slight circumstances shall be sufficient to make the gift specific. Bethune v. Kennedy (b), Collins v. Collins (c), Goodenough v. Tremamondo (d).

1842.
CALDECOTT

CALDECOTT.

Upon the whole, it is submitted that the present case must be ranked between the two classes; that the conversion which the testator directs in this case is merely a conversion to be made at the discretion of the trustees, subject to the right of this Court to call upon them to exercise that discretion in a proper manner; that consequently the tenant for life is entitled to the income of the property as it stands, until this Court directs the trustees to exercise their discretion, or, at all events, until the end of one year after the testator's death.

In the course of the argument the Vice-Chancellor referred to Holland v. Hughes (e) and Walker v. Shore (f).

Mr. Spence, Mr. Bird, and Mr. Metcalfe, appeared for the principal defendants.

- (a) 6 Ves. 520.
- (b) 1 Myl. & Cr. 114.
- (c) 2 Bear 512 2 mc K. 703.
- (d) 2 M. & K. 703. 2. Bear. 5/2
- (e) 16 Ves. 111.
- (f) 19 Ves. 387. The following is part of the decree in that case:—"It is ordered, that the Master do inquire what parts of the said estates remain unsold, and to ascertain what was the value of such last-mentioned estates on the

29th Sept. 1811, when the purchases of the said estates which were sold were to have been completed; and his Honour doth declare, that the plaintiff is entitled to receive interest on such sum as the Master shall find to have been the fair value of such unsold estates at the period aforesaid, after the rate of £4 per centum per annum, from the said 29th September, 1811."
R. L. 1814, B. fo. 1832.

1842.
CALDECOTT

CALDECOTT.

THE VICE-CHANCELLOR.—A complete provision for the respective rights of the tenant for life, and those entitled in remainder, cannot now be made. There not being information on which the Court can finally deal with the whole question, there must be some further inquiry.

It has been contended for the plaintiff, that the testator has here expressed such an intention as was gathered from the particular language of the wills in Bethune v. Kennedy, Collins v. Collins, and Pickering v. Pickering; viz. that though the residue of the personal estate is given in succession to several persons, yet the ordinary rule of law should not apply, and that a portion of the residue should remain either absolutely or during a limited period in the state in which it was at the testator's death. When such an intention is to be collected from a will, it is to be acted upon; though, as a general rule, no doubt, where a testator subjects the residue of his personal estate to a series of limitations, without any particular direction as to the investment or mode of enjoyment, it is clear that the residue must be placed in such a state of investment as to be securely available for all persons interested in it,—as, for instance, in Government perpetual annuities, or upon mortgage of freehold estates.

The question is, whether the tenant for life in this case is entitled to call on the Court to depart from the ordinary rule. The testator begins his residuary clause thus:—
"As to the residue of my personal estate, I give the same to my executors," (this, as far as it goes, is favourable to the general rule, and unfavourable to the exception), "in trust, to be by them from time to time, as they shall think fit, turned into monies for the payment of my debts and legacies, as well those given by this my will as those which I may hereafter give by any codicil or codicils." I cannot read these words as expressing more than the law would direct or imply without them. He goes on,—"And subject thereto, I direct my said executors and trustees from time to time to lay out and invest the same, with all ac-

cumulating produce, in the purchase of lands." Now it is said, that the word "same" here means the specific personalty which he might have at his death. I think, however, that this would be too speculative a construction of the will, and that the clause points to nothing but the general purpose of the executors doing their duty in the ordinary way, and does not take the case out of the ordinary rule. I shall presently notice the words "accumulating produce." He goes on to direct, that all such purchased premises shall be conveyed to the same uses, as nearly as possible. as his present lands are limited to, and that the interest and produce of "my said personal estate," which means the residue of his personal estate, "which shall from time to time arise and be made before and until the said monies shall be invested, shall be paid to the person or persons who would be entitled, under the trusts of this my will, to the rents and profits of the said lands and hereditaments if actually purchased, and as an addition thereto." Here the word "invested" means invested in the purchase of land. I have already said, that, judging from what has gone before, he did not mean the general rule of law to be departed from. Do we collect any such intention here? The words "personal estate" mean, as I have said, whatever remains after providing for the charges. Nor can I discover here anything peculiar or extraordinary-anything denoting more than ordinary administration, according to the common course of law. The expressions, in my mind, carry the case no farther than if the testator had not used them at all.

And though prima facie it might seem, if there were nothing beyond the words "accumulating produce," as if the rule in Situell v. Bernard applied, and that they meant the first year's income, yet, when we find, in combination with those words, a direction that "the interest and produce of the testator's personal estate which shall from time to time arise and be made before and until the

1842. CALDECOTT 2. CALDECOTT. 1842.
CALDECOTT

O.
CALDECOTT.

said monies shall be invested," shall be paid to the person or persons who would be entitled to the rents and profits of the land if actually purchased, I think that they make no difference.

pa.p.737

Then the question arises, supposing this view of the case to be correct, what is the extent of the interest of the tenant for life? First, the will must be dealt with upon the footing that the funeral and testamentary expenses, and the debts and legacies, (as to principal), must be borne by the capital—the interest upon the debts and legacies by the tenant for life during his time. A declaration, therefore, to that effect, though perhaps superfluous, will, I think, not be wrong. Subject to that, I have no hesitation, upon this will, in giving the tenant for life, as from the death of the testator, the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognised and allowed to be continued by this Court. This, possibly, may be the case with the canal shares.

With regard to those parts of the personal estate which neither were at the testator's death, nor have since been, in such a state of investment as ought to be recognised and allowed to be continued by this Court, I am of opinion that such a rule ought to be applied as was applied by Lord *Eldon* to leaseholds in *Gibson* v. *Bott*, and by Sir *William Grant* to the copyholds in *Walker* v. *Shore*, to which I have already referred.

It appears to me that these two principles will dispose of every thing that is to be found in the seventh schedule. With respect, therefore, to that part of the case—

Refer it to the Master to inquire and state, whether the canal shares mentioned in the seventh schedule, or any and which of them, were at the testator's death, and whether the same, or any and which of them, have ever since continued to be, and whether the same, or any and which of them, now are fit and proper permanent investments for the purposes of the said testator's will, as parts of his residuary personal

estate, having regard to the rights and interests of all parties therein, until the same, or the proceeds thereof, shall be laid out in the purchase of real estate; and whether it is fit and proper, and whether it will be for the benefit of all parties interested, that the said canal shares, or any and which of them, should now be sold. Let the Master inquire and state what was the value of the canal shares respectively at the testator's death, and what was their value respectively at the end of a year from the testator's death. Direct the insurance shares to be sold, and let the proceeds be brought into Court to a separate account. Let the Master inquire and state what was the value of the insurance shares at the death of the testator, and what was their value at the end of a year after the death of the testator. Let the bank stock be sold, with like inquiries as to value. Like inquiries as to mortgages (except equitable mortgages) as in the case of the canal shares. Let the Master inquire and report what ought to be done with the equitable mortgage for £6000, and whether the security for the same can in any, and what respect, be improved, and what ought to be done in respect thereof. Like direction, as to the mortgages of tolls, as in the case of the insurance shares. With regard to the canal shares which were sold, let the Master inquire and state what they were sold for respectively, and what was their value at the testator's death, and what was their value at the end of a year from the testator's death. Let £2000 be paid to the tenant for life, on account of his interest in the income of the residuary estate, without prejudice, and subject to such order as may hereafter be made.

CALDECOTT D. CALDECOTT.

1842. March 10th. 11th. Coli. 309

Between John Benson, Lewis Mausse, David Cannan, and CHARLES SANDERSON, on behalf of themselves, and all other the Proprietors or Shareholders of the Bahia STEAM NAVIGATION COMPANY, Plaintiffs;

and

JOSEPH LIDWELL HEATHORN, GEORGE NELTHORPE, RI-CHARD THORNTON BROWN, TANFIELD VACHELL, THOMAS FARNCOMB. and THOMAS FARMER, Defendants.

H. being a director of a joint-stock company, established for the building, pur-chasing, hiring, and employment of steamvessels, purchases a vessel for £1340. and afterwards sells it to the company as for £1500. charging the company with commission at £1 per cent.,

the broker's

IN June. 1838, the plaintiffs and several other persons agreed to form themselves into a society or partnership for the purpose of building, purchasing, hiring, and employing steam and other vessels to convey and carry goods and passengers in the bay and waters of the province of Bahia, and elsewhere along the coast of Brazil, and to and from such other parts and places as the directors for the time being of the said society or partnership might see fit, and to charter, hire, hold, and possess ships or shares from a stranger, therein for the purposes above mentioned, and for all purposes incident thereto; and it was agreed that the defendants should be the first directors of the company.

This agreement was carried into effect by a deed of set-

earnest money, and the expenses of the bill of sale to himself, there being but one bill of sale. Such a trans-

action cannot stand in a court of equity.

A ship's husband, being the servant of the ship-owners, holding an important office, and open to the vigilant superintendence of his employers, it is primă facie a breach of trust in any director of a company established for the purpose of acquiring and working of vessels, especially where the directors have the exclusive management of the concern, to take upon himself the duties of ship's husband. Where, therefore, in a company so constituted, one of the directors, with the consent of others forming with himself a board of directors, undertook the office of ship's husband, and in that character received out of the funds of the company such sums for commission and brokerage as are usually allowed to the ship's husband:—Held, that he must refund those monies; and semble, that the other members of the board of directors were similarly responsible in the event of any inability in the principal party implicated to refund.

A bill may be brought by the present directors of a joint-stock company on behalf of them-

selves and all other the members of the company, against the former directors of the company, for the purpose of being relieved against a fraud in which all the former directors are alleged to

have been involved. See Taylor v. Salmon, 1 M. & C. 142.

Semble, that the stat. 3 & 4 Will. 4, c. 55, s. 33, which authorizes a particular mode of registering vessels belonging to joint-stock companies, does not apply to a joint-stock company in which foreigners are shareholders.

Semble, that a covenant to refer all matters in difference between shareholders of a company to arbitration, the submission and award to be binding and conclusive on the parties, " without further suit or trouble," is no bar to a suit in a court of equity between the same parties and for the same matters.

tlement dated the 1st January, 1839, by which the exclusive right of steam navigation in the waters of Bahia, which had been granted by a decree of the government of that province, was vested in three trustees, their executors, &c., in trust for the company, by its name of the "Bahia Steam Navigation Company." This deed contained. amongst other clauses, the following:--That the business and concerns of the company should be carried on under the management of six directors; that such directors should have the general management, direction, superintendence, and control of the business and concerns of the company, and should have power to enter into and execute any contract for the company, and should have the custody of the books of account, and other books, deeds, and papers, and should have power to direct the investment, calling-in, laying-out, sale, and disposal of the company's stock, effects, funds, monies, and securities, and to call general and other meetings, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends and profits on shares, and to do all other things necessary, or to be deemed by them proper or expedient for carrying on the business and concerns of the company, and should also frame the rules and regulations, and prescribe the orders and directions for carrying on the business and concerns of the company, and alter and vary the same from time to time as they in their discretion might think proper, and all such rules and regulations should be binding and conclusive on all the proprietors for the time being; and no individual proprietor, not being a director, except the auditors in respect of their duties as auditors, should have a right to any interference, management, direction, or control in or over the business and concerns of the company. The deed also empowered the directors to apply to the Crown for letters-patent to restrict their liabilities. It provided that no directors should be deemed a court unless BRHSON v.

BENSON o. HEATHORN.

three were present, but that a court of directors should, except where it was otherwise expressly provided, have all the powers and authorities vested in the directors for the time being, as if all were present. That no money should be paid by the company except by means of cheques on their bankers; but that cheques and receipts might be signed by any two directors. Lastly, that there should be allowed to the directors collectively the annual sum of £650 for their time and trouble.

On the footing of this deed the company had commenced operations, several foreigners becoming members of it; but it appeared that the full number of shareholders had not signed the deed.

The bill was filed for the purpose of obtaining relief against various acts of misconduct alleged to have been committed by the defendant Heathorn, in collusion with or by the permission of the other defendants as his codirectors. It stated that a purchase having been effected in August, 1828, by Heathorn, under the direction of three of the other defendants, of three steam-vessels, called the City of Kingston, the Lionel Smith, and the Pearl, the plaintiffs had lately discovered that Heathorn, with the knowledge and privity of the other defendants, had caused the three vessels to be transferred into his own name in the registry in the port of London, in which name they had ever since continued; and that at a meeting held on the 8th September, 1838, at which the defendants, Nelthorpe, Vachell, Brown, and Heathorn were present, a cheque for £160, signed by those directors, had been made and delivered to Heathorn for the payment to him of commission on the purchase of those vessels, being at the rate of £1 per cent.; which sum he had accordingly received out of the company's funds. That the defendant Heathorn was a shipowner, and that, on the 22nd August, 1838, he, well knowing that the company would want a ship to carry coals to Bahia, contracted

for the purchase of a vessel called the Nourmahal for the sum of £1340; that subsequently, at a court of directors held on the 18th September, 1838, at which Vachell, Farncombe, Brown, and Heathorn were alone present. Heathorn was requested to treat for the purchase of a good second-class vessel for the purpose above-mentioned; and that afterwards at another meeting, (21st September, 1838), at which Vachell, Farncomb, and himself were the only directors present, Heathorn, concealing the fact of his previous purchase for £1340, reported that he had purchased the Nourmahal for the company for £1500; that a cheque for £400, signed by the directors present, was then delivered to Heathorn on account of such purchase-money of £1500, and that ultimately the whole of that sum, together with £2 2s. earnest money, and the expenses of the bill of sale, and a commission of £1 per cent. on the purchase-money, was paid by the last-named directors to Heathorn out of the funds of the company; and he afterwards procured the Nourmahal to be registered in his sole name.

The bill further stated, that at a meeting held on the 5th March, 1839, proposals were made that the several vessels so purchased should be registered in the names of certain persons as trustees for the company, but that no farther proceedings had been taken in this matter by the defendants; and therefore the bill charged, that the defendants ought to refund to the company the amount of the purchase-monies paid for these vessels out of the funds of the company, unless Heathorn should forthwith transfer such vessels into the names of trustees.

The bill also stated, that Heathorn was the principal acting director of the company, and that, with the knowledge of the other defendants, he had effected insurances on the said vessels and their freights and cargoes, and had purchased supplies and provisions for them; that the company being dissatisfied with his accounts, the same were

BENSON v.

BENSON O. HEATHORN.

three were present, but that a court of directors should, except where it was otherwise expressly provided, have all the powers and authorities vested in the directors for the time being, as if all were present. That no money should be paid by the company except by means of cheques on their bankers; but that cheques and receipts might be signed by any two directors. Lastly, that there should be allowed to the directors collectively the annual sum of £650 for their time and trouble.

On the footing of this deed the company had commenced operations, several foreigners becoming members of it; but it appeared that the full number of shareholders had not signed the deed.

The bill was filed for the purpose of obtaining relief against various acts of misconduct alleged to have been committed by the defendant Heathorn, in collusion with or by the permission of the other defendants as his codirectors. It stated that a purchase having been effected in August, 1828, by Heathorn, under the direction of three of the other defendants, of three steam-vessels, called the City of Kingston, the Lionel Smith, and the Pearl, the plaintiffs had lately discovered that Heathorn, with the knowledge and privity of the other defendants, had caused the three vessels to be transferred into his own name in the registry in the port of London, in which name they had ever since continued; and that at a meeting held on the 8th September, 1838, at which the defendants, Nelthorpe, Vachell, Brown, and Heathorn were present, a cheque for £160, signed by those directors, had been made and delivered to Heathorn for the payment to him of commission on the purchase of those vessels, being at the rate of £1 per cent.; which sum he had accordingly received out of the company's funds. That the defendant Heathorn was a shipowner, and that, on the 22nd August, 1838, he, well knowing that the company would want a ship to carry coals to Bahia, contracted

for the purchase of a vessel called the Nourmahal for the sum of £1340; that subsequently, at a court of directors held on the 18th September, 1838, at which Vachell, Farncombe, Brown, and Heathorn were alone present, Heathorn was requested to treat for the purchase of a good second-class vessel for the purpose above-mentioned; and that afterwards at another meeting, (21st September, 1838), at which Vachell, Farncomb, and himself were the only directors present, Heathorn, concealing the fact of his previous purchase for £1340, reported that he had purchased the Nourmahal for the company for £1500; that a cheque for £400, signed by the directors present, was then delivered to Heathorn on account of such purchase-money of £1500, and that ultimately the whole of that sum, together with £2 2s. earnest money, and the expenses of the bill of sale, and a commission of £1 per cent, on the purchase-money, was paid by the last-named directors to Heathorn out of the funds of the company; and he afterwards procured the Nourmahal to be registered in his sole name.

The bill further stated, that at a meeting held on the 5th March, 1839, proposals were made that the several vessels so purchased should be registered in the names of certain persons as trustees for the company, but that no farther proceedings had been taken in this matter by the defendants; and therefore the bill charged, that the defendants ought to refund to the company the amount of the purchase-monies paid for these vessels out of the funds of the company, unless Heathorn should forthwith transfer such vessels into the names of trustees.

The bill also stated, that Heathorn was the principal acting director of the company, and that, with the knowledge of the other defendants, he had effected insurances on the said vessels and their freights and cargoes, and had purchased supplies and provisions for them; that the company being dissatisfied with his accounts, the same were

BENSON v.

BENSON 9.

in August, 1839, investigated by one of the auditors of the company, and that by such investigation it appeared, and the plaintiffs for the first time discovered, that Heathorn charged the company with, and received from their funds, not only the commission before-mentioned, but also a commission of £1 per cent. on freights to Bahia, and a commission of £2½ per cent. on the amount of his general disbursements for the company, and £5 per cent. on the gross amount of all the insurances effected by him for the company, and £2 per cent. on the recovery of average losses on insurances effected for the company, and that the sums charged by him for such commissions against the company, and received by him out of the funds thereof, amounted to the sum of £581 and upwards.

The bill, after alleging that the defendants, except Heathorn, had retired from the directorship in October, 1839, that Heathorn had been displaced in the subsequent December, and that the plaintiffs had been appointed directors in the room of the defendants, prayed,—that the defendants might be declared guilty of a breach of trust. the defendant Heathorn in receiving, and the other defendants in permitting him to receive, out of the funds of the company, all such sums as had been received by Heathorn for commissions, discounts, insurances, allowances, and also the sum of £160, the difference between . the sum of £1840 paid by Heathorn for the ship Nourmahal, and £1500 which he received for the same from the company; and that it might be declared that the defendants were jointly and severally liable to refund the same several sums, with interest at £5 per cent. That an account might be taken of the sums received by the defendant Heathorn for commissions in the purchase of ships, and on freights and insurances of ships, and for discounts and allowances in respect of coals, provisions, goods, stores, and supplies, which he had received of the different tradesmen, but not accounted for to the company, &c. Also, that the

defendants might be declared guilty of a breach of trust, Heathorn in procuring, and the other defendants in permitting the several ships in the pleadings mentioned (excluding the Nourmahal) to be transferred on the registry into the sole name of the defendant Heathorn, instead of the names of the trustees of the company; and that the defendants might be decreed to repay the purchase-money in respect of such vessels, with £5 per cent. interest.

The defendant Heathorn, by his answer, admitted that he had received £100 for his salary as director, from June 1838 to June 1839. He stated that he had been for many years a ship-owner and ship-agent, and that in August 1838, he was required by the directors of the company to act as ship's husband of the company's vessel; to which he agreed, on the understanding that the customary commis-. sion and other allowances should be made to him. alleged that the duties of ship's husband were distinct from those of a Director, having reference to details with which a Director had no immediate concern; and that as such ship's husband the defendant, personally, underwent much labour, and spent much time in the service of the company. He insisted that, if he had not been appointed ship's husband, some one else would have been appointed to that office; and he submitted that the company were authorised by their deed of settlement to appoint one of their own body ship's husband. He admitted that he charged the company with, and had been paid out of the funds of the company, a commission of £1 per cent. on the costs of the steam-vessels, and on the sum of £1500, the purchase-money of the Nourmahal, and a commission of 21. 10s. per cent. on his general disbursements for the company, and a commission of £2 per cent., not on average losses on assurances effected for the company, but on the amount recovered from the underwriters. denied that he had charged or been paid any commission on BENSON 5.
HEATHORN.

BENSON 0.

freights, or a commission of £5 per cent. on the gross amount of all insurances effected by him for the company; but he admitted that he had been paid a brokerage of £5 per cent. by the insurance offices on effecting policies for the company. He also admitted that the sums received by him for commission and brokerage amounted to £435. ther admitted that he had, in several instances, been allowed such discounts and deductions on tradesmen's bills as in the bill mentioned; but he denied that he had from time to time received out of the funds of the company sufficient monies to pay ready money for the several particulars purchased by him for the company; on the contrary, he stated that he had generally paid the money some weeks in advance out of his own pocket. He admitted, however, that. after giving credit to the company for discounts, deductions. and scorage in some instances, he had in other instances retained sums that amounted to £276; and he insisted on his right to retain those sums, as ship's husband.

With respect to the Nourmahal, the defendant stated that he originally treated for the purchase of that vessel in May, 1838, but the negotiation failing by reason of the price demanded, he did not complete the purchase till August, when he paid £1340 for the vessel, and 21. 2s., the usual fee to the broker. He alleged that this purchase was made on his own account, and not as agent of the company. He admitted that he afterwards sold the vessel to the company for the price, and (except as to the alleged concealment) under the circumstances mentioned in the bill; charging them with commission, the 21. 2s., broker's fee, and the expense of the bill of sale from the vendors to himself. Admitting, however, the statements in the bill as to what took place at the meetings of directors on the 18th and 21st September, 1838, he denied the charge of concealment; insisting that his ownership of the vessel was notorious, the bill of sale transferring the ship to himself having been entered at the Custom-House,

and his name having appeared in the East India shipping lists as the owner of the vessel.

Benson 6. Heateobn.

The other defendants, except Farmer, by their answers, admitted the material allegations of the bill, but submitted that there was nothing irregular in the appointment of Heathorn to be ship's husband, or in his receiving profits in that character.

All the defendants, except Farmer, admitted the plaintiffs to be qualified as directors, but submitted that all the other shareholders, or such of them as had executed the indenture of the 1st January, 1839, ought to have been made parties to the suit.

The defendant Farmer, by his answer, set forth a clause of the deed of settlement, by which it was provided, that all matters of dispute between the directors and other persons, including members of the company, should be submitted to arbitration, and the award of the arbitrators should be conclusive and binding upon the persons submitting to the award, "without further suit or trouble (a)." And the defendant stated his belief that the matter in question had been frequently proposed to be submitted to arbitration, and that, therefore, the present suit was unnecessary.

After the bill was filed, the registries of the several ships, except the Pearl, were cancelled.

The cause now came on for hearing.

Both parties entered into evidence at considerable length. The transaction as to the Nourmahal appeared in Heathorn's ledger thus:—Cost price, £1840; carpenters, 2l. 9s.; petty cash, 5l. 8s.; ditto, 4l. 9s. 4d.; ditto, 1l. 11s.; interest, 3l. 16s. 3d.; commission, £15; profit and loss, 127l. 6s. 5d. Total, £1500. On the other hand, a witness on the part of Heathorn deposed to having, by Hea-

<sup>(</sup>a) See Lord Eldon's observations on a covenant not to sue, 6 Ves. 821. And see 2 Nic., Hare, & Car. 354.

BENSON 9.
HEATHORN.

thorn's orders, superintended repairs done to the Nourmahal, before the purchase of that ship by the company, to the amount of between £100 and £150. No entry, however, of this expenditure appeared in Heathorn's books.

Mr. Simpkinson, Mr. Roupell, and Mr. Pigott, for the plaintiffs, submitted, first, that the defendants were bound to have the Pearl registered, so as to give the company a legal title to that vessel, or else to restore to the company the purchase-money for that vessel; secondly, that the defendants were bound to account for and refund what had been received by Heathorn in the affair of the Nourmahal; and, thirdly, that they were liable, in like manner, in regard to the sums admitted to have been received by him for commission, &c., as ship's husband.

Mr. Wigram and Mr. Lewis, for the defendant Heathorn. -The plaintiffs sue on behalf of themselves and all other the shareholders of this company. Can they do so while the number of directors is not complete? The Vice-Chancellor referred to Atwood v. Small (a), and Hickens v. Congreve (b)]. It is submitted that they show no title to sue till all the calls are paid: Walburn v. Ingleby (c). As to the charges against the defendant, he is clearly not to blame as to the registration, for the trustees named for that purpose refused to allow the registration to be made in their names, and accordingly his name was used for the accommodation of the company. He is ready, however, to take any steps for the legal registration of the vessel as the Court may think fit. Then as to his conduct as ship's husband, he has acted usefully and beneficially to the company. It is the constant course for a part owner to be ship's husband. The office was one of burden rather than

<sup>(</sup>a) 6 Cl. & Fin. 523. (b) 4 Russ. 562. (c) 1 Myl. & K. 61.

of benefit to him, and he has been desirous to abandon it. It was an office of burden, inasmuch as acting for a company of this particular description, he might have been personally liable for stores supplied: Thomson v. Davenport (a). With respect to the Nourmahal, what reasonable doubt is there that the defendant purchased it for his own benefit? It was not till after the defendant's purchase that the directors gave notice to him that they wanted a vessel. The relief prayed on this head is inconsistent with the case made by the bill. The prayer should have been to set aside the whole transaction: Brookman v. Rothschild (b): Gillett v. Peppercorne (c).

BENSON D.
HEATHORN.

Mr. Cooper and Mr. Parry, for the defendants Vachel, Nelthorpe, Brown, and Farncombe.—The defendant Farncombe, not having become a director until after the registration of the vessels, is not liable for any breach of trust on that account; and assuming that his co-defendants are liable in respect of the £160 commission, he at least is not implicated in that transaction, though it must be conceded that he joined in the drafts given for Heathorn's commission, &c., as ship's husband.

But it is submitted that the bill should be dismissed against all these defendants, with costs. We do not dispute that, according to modern decisions, a bill may be sustained by some of the partners against others, though praying neither a general account nor a dissolution, and confined to one transaction. But it is a different thing to say that you may make parties to that suit persons who have not themselves committed a breach of trust, but whose only fault is, that by neglect or error they have permitted a co-director, or one of the managing partners, to possess himself of part of the partnership property, and to acquire over that property the sole control. To permit

<sup>(</sup>a) 9 B. & C. 78.

<sup>(</sup>c) 3 Beav. 78.

BENBON
v.
HEATHORN.

this would be to carry the doctrine of partnership liability much farther than either Lord Eldon or Lord Cottenham has done. The same observation will apply to any sums which the defendants, on the ground of usage, may have erroneously allowed to their co-director. Yet here the bill seeks to charge the defendants generally for the misconduct of one. [The Vice-Chancellor.—Suppose, for the sake of argument, the legal title in these vessels now to be vested in Heathorn; and suppose, what is improbable but possible, that Heathorn should become bankrupt: who would be liable?] Not these defendants, unless the court should go the length of holding, that, in an ordinary partnership case like this, you are at liberty to apply the doctrine which is applied as between trustee and cestui que trust, and to treat these defendants not merely as partners with the plaintiffs, but as trustees for them. Such a result was never contemplated by the parties, for the defendants had a right under the settlement, though they have not availed themselves of it, to apply for letterspatent under the stat. 1 Vict. c. 73, for the purpose of limiting their responsibility. Supposing, however, that these defendants are liable in respect of the commission, they are surely not accountable for the discount which Heathorn, if he has received it, has received without their knowledge.

Lastly—There was no breach of trust in permitting the registration to be made in Heathorn's sole name. No registration, consistently with law, could have been made in the names of trustees. It is not possible to register vessels for a Company like this, because no foreigners can have any interest, direct or indirect, in vessels which are registered, and enjoy the privileges of British vessels: stat. 3 & 4 Will. 4, c. 55, sects. 13, 33.

Mr. Russell and Mr. Adams, for the defendant Farmer.

The VICE-CHANCELLOR.—Serious difficulties have been suggested with regard to these vessels by Mr. Cooper, on the ground that the clause in the last ship registration act, which authorizes the particular mode of registering vessels belonging to joint-stock companies does not apply to the case of foreigners, and therefore that a ship owned wholly or in part, directly or indirectly, by "foreigners," is not within the influence of that clause, and cannot be registered at all. If that view of the law is accurate, which perhaps it is, there certainly were great difficulties in the way of registering these vessels. Whether they ought to have been registered at all-whether any act ought to have been done with a view of acquiring or retaining for them the privileges of British built ships, may be a question; but as between the parties to this record, undoubtedly the Company were entitled to the benefit of them in the most effectual manner, and no man can consider that the most effectual mode of securing the interests of the Company was adopted. Either the matter should have been treated at once and openly with regard to the public as a purchase by foreigners or in which foreigners were interested, or if the enjoyment of British privileges in respect of these ships was to be maintained or attempted. then, as between the Company and those who managed its affairs, the Company should have been placed in as secure a position as could be, that is, a certain number of respectable persons should have been selected, and there should have been some collateral writing of more or less avail, declaring the real nature of the transaction. The title, it is obvious, would then have been, if not completely secure, much more secure than by a registration in the name of a single person, exposed to all the obvious risks notorious to all persons having any experience in such matters. Though, therefore, I believe that there was an absence of all ill intention on the subject, no man can doubt that

Benson

b.

Heathorn

BENSON v.
HEATHORN.

there was, as Mr. Russell has expressed it, gross imprudence. Considering the peculiar nature of the case, the facts that have occurred, and the frequent employment of the vessels in foreign seas, I certainly am not prepared to say, nor, indeed, are there materials in point of fact before the Court to enable me to say how the title is vested.

But Mr. Heathorn has, with great propriety, undertaken by his counsel to do all acts, if any, which may be necessary on his part, to give the Company a complete title to these vessels, and place them in some proper manner under the power and control of the directors, which as between at least the parties to this record they certainly ought to be. The Court must have further information on this subject. I do not at this moment know whether damage may not have been sustained by the Company in consequence of the state of the English registration. I cannot at this moment be sure that damage may not hereafter be sustained by the Company in consequence of this position of the title. It may become an important question whether the directors, or any of them, may or may not be liable to make good any damage thus occasioned. I cannot, at present, therefore, part with this portion of the case. There must be enquiries directed upon it, and as all parties in this respect intended nothing probably but what was right, and as the conduct of the trustees, or some of them, has created the difficulty, I shall reserve the costs of this part of the suit. [His Honour then directed enquiries for the purpose of ascertaining in whom, for whose use, and in what manner the title to the vessels was vested at the time of the decree, and whether as to title they were within the control of the Company, and whether any thing and what ought to be done to vest that control in them; and when first the defendants had notice of the registration in Heathorn's sole name; and whether the Company had sustained any and what damage from such registration: with liberty to state special circumstances, and with a reservation of all the costs as to this part of the suit.

BENSON v.
HEATHORN.

The next question is with regard to the ship Nourmahal, and it is perhaps to be regretted that this part of the case has been brought before a court of justice, and not arranged out of Court. The parties however had a right to bring the matter here on either side. It appears that this vessel was bought for a sum of £1340, by Mr. Heathorn, and was transferred into his name, and he became the registered owner. It appears that subsequently a vessel of her description being required by the directors, Mr. Heathorn, who had been before employed by the directors for the purpose of purchasing ships, was asked to look out for such a vessel. He reported to the directors that he had agreed to buy the ship Nourmahal for a sum of £1500. This report is adopted. A cheque of £400 by way of deposit is given him, contemporaneously with the report and its adoption; and within a week, or less than a week afterwards, the remaining £1100 of the £1500 is paid; another singular circumstance of the case being. that notoriously, in the City of London, before this day. (and some at least of the directors were men of business. though it is very possible that Colonel Vachell and Colonel Nelthorpe never came into the City, except to attend the board), this vessel had been publicly advertised in the usual place for such advertisements as the vessel of Mr. Heathorn himself. This fact also appears, that, as on a purchase for the sum of £1500 from a stranger, (at least I must suppose so), Mr. Heathorn is actually paid £15, as a commission of £1 per cent. on the £1500; he is also allowed the two guineas earnest, which, according to the usual course of trade, is paid to the broker on such occasions; and what perhaps is still more extraordinary, he claims and is allowed the costs of the bill of sale; the only bill of sale which took place being the bill of sale from the

BENSON v.
HEATHORN.

former owner, which vested the property in himself previously to the proposal to him that he should buy a vessel of this description.

Under these circumstances, is it possible for me, whatever may have been the secret intentions of Mr. Heathorn's mind when he bought this vessel—is it possible for a Judge in a Court of equity to hear him say that he bought it otherwise than as agent? I find it utterly impossible to do so; his own mode of proceeding has, in my opinion, indelibly and inextricably fixed him with the character of agent from the beginning of that transaction. The declaration, therefore, in that respect, must be that the defendant Heathorn ought to be considered as having purchased the ship Nourmahal for £1340, as the agent and on the behalf of the directors. Enquire what sum or sums in respect of the ship on that footing, as well for the purchase as in respect of expenses properly incurred, and proper repairs, if any, properly done, was or were due to the defendant Heathorn on the 21st of September, 1838. And if the amount shall appear to have been less than the total money received by him from the directors in respect of the transaction, declare him liable for the difference, with interest on such difference, at the rate of £5 per cent. per annum from the time when he received the same. And declare the defendant Heathorn liable to so much of the costs of the suit as relates to the ship Nourmahal, without prejudice to the question whether the other defendants, or any, and which of them, ought to be made also liable to those costs.

The next point relates to the commissions and the discounts. It may be right, and probably is fair, to assume, for the purpose of the argument, that all these charges and allowances to Mr. Heathorn were such as would have been according to usage, and proper in the case of a stranger. His position, however, was very different. He was one of six directors of this Company, to whom exclusively the

entire management of its affairs was entrusted. I say exclusively, because, as is obviously necessary in companies of this description, the shareholders in general were prohibited from interfering. These six directors, being so entrusted, receive among them, from the funds of the Company, as a remuneration for their trouble in being the exclusively acting partners in this concern, a sum of no less than £650 per annum, capable, as I read the deed, of increase, but not liable to diminution; this sum they are to divide between themselves as they think fit.

Now, it is obvious that persons so circumstanced were under an obligation to the shareholders at large to use their best exertions in all matters which related to the affairs of the Company for the welfare of the concern thus entrusted, not gratuitously, to their charge.

I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in the engagement, that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty.

The main or only business of this Company consisted in acquiring, managing, and working steam-vessels. It may have been that a ship's husband was necessary. It is the defendants' case, or the case at least of Mr. Heathorn, that a ship's husband was necessary. This is denied on the part of the plaintiffs, who say that the directors might very well have performed such duty as the management of the vessels required without the interposition of a ship's husband. On that I give no opinion; but if a ship's husband was necessary, it is obvious he would become the responsible servant of the directors, in an onerous office—that he would become an accounting party to them, and that his conduct, as well as his accounts, however respectable he might be, would require a constant and vigilant superintendence and control. That constant and vigil-

BENSON O. HEATHORN.

BENSON v.

ant superintendence and control one and all of the directors had, for value, contracted to give; and what is done? One of these very directors becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch: at once, therefore, to put the case at the very lowest, and in a manner most favourable to Mr. Heathorn, paralyzing him as a director in this respect, and leaving the Company, as far as these important matters were concerned, under the protection of but five, while they believed themselves to be under the protection of six. But it does not rest there. The five remaining directors were placed in the difficult and invidious position of having to check and control the accounts of one of their own body, with whom they were associated on equal terms, in the management of every other part of the affairs of the concern. It has been, nevertheless, with an appearance of seriousness, treated as an arguable question, whether I can allow this gentleman to receive profits, however reasonable in amount, if they had been claimed by another person, which he has made by this employment, in which he ought never to have embarked.

If the Court were to do so, if the Court were to allow to a person so circumstanced that which might fairly be allowed to a stranger, it would obviously afford the strongest encouragement to a departure from what is the right and regular course in every similar establishment. A party would take a situation of this nature with the certainty of having a fair remuneration, and with the probable advantage of retaining what was unfair. It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar, (for there is no magic in the word), induces the Court (not only for the sake of justice

in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is trusted by another) to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced-saying, to the person complaining that he has thus employed his time and skill without remuneration, that he has elected so to treat the matter; that he has had his reward, for he has had the possibility, nay, the probability of retaining to himself that which he never ought to have retained; that he has been willing to run the risk, and cannot complain if he happens to lose the stake. It is on this principle that Lord Eldon proceeded in the cases so familiar to us all of purchases by trustees. It is only an instance of the application of the rule, not the rule itself. In those cases Lord Eldon said—(I allude particularly to Ex parte Lacey (a), which occurred soon after Lord Eldon first received the great seal)-" The rule is founded on this, that, though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties in ninety-nine cases out of a hundred, whether he has made advantage or not." If, in the present case, Mr. Heathorn had openly and directly brought forward the matter before the body of shareholders generally, I consider it possible, if not probable, that he would have been allowed to receive, and would now have been entitled to retain, all the sums in question paid for commission. He has not elected to take that open and straightforward course; he has chosen that the matter should be undisclosed, and he must abide the inevitable result.

I declare, therefore, that the defendant Heathorn was

BENSON v.
HRATHORN.

BENSON U. HEATHORN.

not entitled to the commission which was allowed to him by the board of directors as ship's husband or otherwise. Take an account of what he has received in respect of it, and calculate interest thereon at £5 per cent. per annum. Declare that the defendant Heathorn is liable to so much of the costs of the suit as relates to the commission, without prejudice to the question whether the other defendants, or any and which of them, are or are not liable. Enquire whether such commission, or any and what part or parts thereof was or were allowed or paid to the defendant Heathorn with the consent or privity of the other defendants, or any, or either, and which of them.

What I have said with respect to the commission of course applies in principle to the discounts. I am not sure that it does not apply in a stronger manner. I cannot conceive any course of dealing more unsustainable than Mr. Heathorn, in his situation, obtaining the benefit of discounts from the tradesmen, and charging the directors (of whom he was one) the full amount, representing a sum as paid which was never in fact paid. It is impossible to maintain such a transaction.

I cannot, however, see my way now to do complete justice in that respect, because, in addition to knowing exactly what discounts were allowed and not accounted for, I must know what was the state of his funds as between him and the directors at the time; and I must know what was the state of the funds of the Company, with a view to the facilities which those funds, if properly employed, might have afforded towards paying tradesmen ready money. Therefore, let the Master enquire what discounts or allowances have been from time to time received by or made to the defendant Heathorn in the character of ship's husband or agent, whether in respect of goods or otherwise, for the ships respectively, or any of them, of which the Company has not had the full benefit; and let him state the dates and amounts of the same; and state, at the request of

either party, any circumstances specially with regard to the state of the funds or cash account between Mr. Heathorn and the directors, and the cash balances for the time being of the Company, at the respective times of such discounts or allowances, or any of them. Reserve the question of costs as far as relates to the discounts.

1842. Benson HRATHORN.

## DOWELL v. DEW.

By indentures of settlement, dated the 23rd and 24th Feme covert July, 1819, and made previously to the marriage of under her mar-Thomas Tyringham Bernard and Sophia Charlotte, his riage settlement to an interest in wife, certain freehold estates, including the Clifford Court the settled lands Farm, all of which were the property of Mrs. Bernard, rate use for life, were conveyed to the use of trustees, for the separate use of leasing for of Mrs. Bernard for her life, with remainder to trustees for any term not a term of 150 years, with remainder to the use of Mr. ty-one years in Bernard for his life, with remainder to trustees to pre-

March 7th. 8th.

for her sepawith a power exceeding twenthe lands for

fourteen years to D., and about a year and a half before the expiration of that lease, signed and delivered to D. a written undertaking, by which she engaged, upon the expiration of the existing lease, to grant to D. a new lesse, upon the same terms and for the same period as before. The lease expired, and D. continued in possession without taking a new lease, but doing acts on the premises which were solely referable to the written undertaking. Afterwards feme covert died:—Held, first, that the giving the written undertaking was, under the circumstances, a valid execution of the power; and, secondly, that the transaction between the parties amounted to an agreement, which was in part performed by the continuance of the possession of the tenant after the expira-

which was in part performed by the continuance of the possession of the tenhal atter the expiration of the lease, and was therefore capable of being enforced in a Court of equity.

In order to establish the validity of an agreement in a Court of equity, it is not necessary to shew that it was binding on both parties at the time of its being signed; it is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other.

Although a lessor has power to lesse in possession only, and not in reversion, yet an agreement entered into between lessor and lessee, a short period before the expiration of an existing lease, for a renewal of the lease upon the same terms as before, is reasonable, and may be enforced in equity, as between the agreeing parties; provided the effect of the agreement is, that the rent and covenants in the renewed lease are conformable with the terms of the power.

The assignee of a contract to grant a lease (there being no covenant not to assign, or the breach of such covenant being waived), may sustain a bill in equity against the lessor for specific performance of the contract, provided he guarantee to the lessor the responsibility of the assignor.

Action directed to be brought with a view of ascertaining whether a rent agreed to be paid at a future period was, conformably with the terms of a settlement, the best rent that could be gotten for the property, and whether certain circumstances amounted to a waiver of the breach of a covenant not to assign. 1 20 C/ V. Dowell v. Dew.

serve, &c., with remainder to trustees for the term of 700 vears, with remainder to the first son of the marriage in tail male, with divers remainders over. The trusts of the terms were for raising maintenance and portions for younger children. The settlement contained a proviso that it should be lawful for the said Sophia Charlotte. during her life, and after her decease for the said Thomas Tyringham Bernard during his life, and after the decease of the survivor of them, for the person or persons who under or by virtue of the limitations thereinbefore contained should for the time being be entitled to the first estate of freehold or inheritance in the said hereditaments. in case such persons should be of full age, but if not, then for the guardian or guardians of such persons, to demise or lease all or any part or parts of the hereditaments expressed to be thereby granted and released, with the appurtenances, for any term of years not exceeding 21 years in possession, but not reversion, remainder, or expectancy, or by way of future interest, and so that upon every such lease there should be reserved and made payable the best and most improved yearly rent that could be reasonably had for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for the making thereof, and so that in every such lease there should be contained a condition of re-entry on the non-payment of the rent to be thereby reserved by the space of 21 days next after the same should become due and payable, and so that the lessee to whom such lease should be made should seal and deliver a counterpart of such lease, and so that no lessee should be authorized to commit waste or exempted from punishment for committing waste.

The marriage took effect, and there were children of the marriage; David William Bernard being the eldest son.

By an indenture dated the 8th February, 1823, and made between Sophia Charlotte Bernard of the first part,

Thomas Tyringham Bernard of the second part, and William Dowell of the third part, it was witnessed, that, in consideration of the rents thereinafter reserved, and the covenants thereinafter contained on the part of the lessee. Sophia Charlotte Bernard, by virtue and in exercise of the power given to her for that purpose by the indenture of the 24th July, 1819, and of all other powers, &c., and with the privity and approbation of Thomas Tyringham Bernard, did demise, lease, and let, and the said Thomas Tyringham Bernard did let and confirm to the said William Dowell, his executors, and administrators, all that &c., [describing the Clifford Court Farm], to hold the same, with the appurtenances, unto the said William Dowell, his executors and administrators for the term of fourteen years, to be computed from the 2nd February then instant, at the yearly rent of £525, deducting land-tax and a chief-rent of £15 per annum; provided always, that if the rent should be unpaid for the space of 21 days, or if the said William Dowell, his executors, administrators, or assigns, should at any time or times during the continuance of the said demise, assign, transfer, set over, underlet, or otherwise part with the said indenture, or the premises thereby demised, or any part thereof, except certain cottages with their appurtenances, to any person or persons whomsoever, without the special license and consent of the person or persons for the time being entitled to the next and immediate reversion or remainder in the demised premises first had and obtained in writing under hand and seal, or if the said William Dowell, his executors, or administrators, occupiers of the said demised premises, or any part thereof, except the said cottages, should at any time, during the continuance of the said demise, commit any act or acts of bankruptcy wherein a valid commission or commissions of bankrupt should be sued and prosecuted, or if the then present lease or the tenant's term and interest in the said demised premises or any part thereof should be taken or Downli o. Daw.

Dowell Dowell Dew.

seized under or by virtue of any execution, or warrant, or process in the nature thereof, or should otherwise become legally assignable or salable, without such consent as aforesaid, or if the said William Dowell, his executors, administrators, or assigns, should not in all things well and truly observe, perform, fulfil, and keep all and every the covenants, conditions, stipulations, and agreements, therein expressed and contained on the lessee's part to be observed. performed, fulfilled, and kept, then or in any or either of the said cases, and at any time thereafter it should be lawful for the person or persons for the time being entitled to such next and immediate reversion and remainder as aforesaid, into and upon the said demised premises or any part thereof, in the name of the whole, wholly to re-enter, &c. in forfeiture of the lease. The lease then contained covenants by the lessee for payment of rnet and taxes, for the cultivation of the lands according to the custom of the country, and for keeping the premises in repair.

William Dowell executed a counterpart of this lease, and entered into the occupation of the premises. He died on the 15th March, 1832, having made his will, dated the 25th July, 1825, whereby he bequeathed all his farms and effects to his son John Dowell, whom he appointed sole executor of his will. John Dowell proved the will, and entered into possession and occupation of the premises.

In 1832 Mr. Bernard who was a partner in the house of Duckett, Morland & Co., became bankrupt with his copartners.

In 1835 John Dowell, in contemplation of his lease expiring, and with the intention, as stated by Mr. Bernard, who was examined as a witness for the plaintiff, of laying down part of the farm in grass, applied to Mr. and Mrs. Bernard for a renewal of the lease; upon which he received the following undertaking in writing, signed by Mr. and Mrs. Bernard, and dated the 27th July, 1835, "Mr. John Dowell, as you have expressed a wish to continue in the occupa-

tion of our farm at Clifford Court, we will undertake to grant you a lease on the same terms as the last, for a period of 14 years, when the present lease expires; and we hope you may live long enough to renew it at a future period." Dowell v. Dew.

No new lease was executed in pursuance of this memorandum, but John Dowell continued in occupation of the premises beyond the expiration of the original lease, which took place on the 2nd February, 1837, and the death of Mrs. Bernard, which took place on the 15th May, 1837, until he relinquished such occupation in favour of his brother, the plaintiff, in July, 1837.

In July, 1838, the assignees under Mr. Bernard's bank-ruptcy caused the life-interest of the bankrupt in the estates comprised in the settlement of July, 1819, to be put up to auction, when the defendant Dew was declared the purchaser. This purchase was completed by conveyance in May, 1839. In the particulars and conditions of sale which were circulated on the occasion of the auction, the farm occupied by the plaintiff was described as being in his occupation under an agreement for a lease of 14 years from the 2nd February, 1837, at a rent of £525 per annum, from which land-tax was to be deducted, and subject, amongst other annual outgoings, to a chief rent of £15.

In June, 1889, the defendant Dew served the plaintiff with notice to quit the farm. This the latter refused to do, on the ground of having a good equitable title to the premises under the memorandum of the 27th July, 1835, which had been given to his brother. He however, in order to strengthen his title, took a release from his brother, dated the 29th August, 1839, of all his brother's interest in the farm under or by virtue of that memorandum. And he ultimately filed the present bill, to which David William Bernard was made a party defendant, praying a declaration that the plaintiff was entitled to

Dowell v. Dew.

occupy the premises for the term of 14 years from the 2nd February, 1837, upon the terms contained in the lease, for the specific performance of the agreement of July, 1835, and for a perpetual injunction to restrain proceedings at law to recover the premises from the plaintiff.

The defendant Dew, by his answer, insisted principally on the following points:—First, that the undertaking of the 27th July, 1835, did not amount to a contract, as the same was merely voluntary; but that, even if it had been made for valuable consideration, it would have been inoperative, except as to the separate estate of Mrs. Bernard during the joint lives of herself and her husband; she being a married woman, and her husband having become bankrupt. Secondly, that the transfer of John Dowell's interest, and the delivery of the possession of the premises by him to the plaintiff, was made without the consent inwriting, or otherwise, of the assignees of Bernard, and without any subsequent confirmation on their part; and that if such assignees had been under any obligation to grant a lease to John Dowell upon the terms mentioned in the undertaking of July, 1835, which the defendant submitted was not the case, such transfer and delivery were a direct violation of one of the covenants to be contained in such lease. Thirdly, that the rent of £525 was not the best and most improved yearly rent which could at the expiration of the lease of February 1823, be had or gotten for the premises. Fourthly, that the plaintiff had not, since he had been in possession of the premises, duly kept the covenants of the lease of February 1828, more particularly the covenants for repairs and good husbandry, according to the custom of the country. Lastly, (in denial of allegations in the bill), that no sums of money had been expended by John Dowell on the farm since 1835, which would not have been expended by a tenant occupying merely from year to year.

The cause now came on for hearing.

The general purport of the evidence on both sides is fully stated in the judgment. In support of the plaintiff's case as to the alleged assignment by John Dowell to the plaintiff, and the adoption of that assignment by the assignees, the most material witness was a Mr. Rose. He was appointed manager of the property by the assignees on the 28th October, 1837; and in consequence of a letter which he received from the sister of the plaintiff, dated the 22nd of that month, in which she mentioned the particulars of the transfer and assignment, the deponent on the 9th October visited the farm, and saw the plaintiff: and, according to hisown evidence, on finding the cultivation and repairs generally satisfactory, he assented to the substitution of the plaintiff for John Dowell as tenant of the farm.

Several of the plaintiff's witnesses stated that John Dowell, on the understanding that he was to have a new lease, cultivated the farm in a different manner and with greater expenditure than he would have done had he been compelled to quit at the end of the term. And they stated the particulars in which this difference consisted.

The defendant Dew admitted, that, considering the plaintiff as a tenant from year to year, he had received rent from him to the 2nd February, 1839.

Mr. Russell and Mr. Parry, for the plaintiff.—The first lease expired on the 2nd February, 1837. No question arises upon that lease, but the covenants contained in it shew that it was a beneficial lease, and that it tied up the hands of the tenant for life. Mrs. Bernard died on 15th May, 1837, about three or four months after the time when the first lease would have expired. Mr. Bernard became a bankrupt in 1832. The sale took place in July, 1838. The particulars of sale describe the property as being in the possession of Dowell, under an agreement for a lease from the 2nd February, 1837. The defendant Dew was declared the purchaser for £4300, and

Dowell v. Dew. Dowell v.

signed an agreement, indorsed on one of the conditions of sale, and dated the 25th July, 1838, the day of the sale. An abstract of the title was delivered, containing the agreement. The conveyance to Dew was dated the 10th May, 1839, and recites the conditions of sale, and the conveyance is expressed to be subject to the existing leases and agreements for leases. On the 20th June, 1839, the notice to quit was given; and, on the 1st August, 1839, the plaintiff gave notice of his intention to apply to this Court. There is no sufficient evidence of any breach of covenant by reason of non-cultivation or otherwise.

In Harnett v. Yeilding (a) there was an agreement to grant a lease on the 1st of November. If the grantor had died before that time, the agreement would have been void; but, having survived the 1st of November, specific performance was decreed. In the present case there was a good equitable execution of the power. And the subsequent dealings of the parties prevent them from saying that the lease is invalid.—Walton v. Stamford (b), and Shannon v. Bradstreet (c), were also cited for the plaintiff.

Mr. Simpkinson, Mr. James, and Mr. Bayley, for the defendant.—The original lease contained a clause, that it should not be assigned without license. The plaintiff files his bill without any such license having been granted. The bill is filed by a person not a party to the agreement, for performance of a contract by which the party with whom the contract was entered into was restricted from assigning. The plaintiff entered into possession in July, 1837. No rent had been received by the assignees antecedently to the sale to Dew. The payment of rent to the assignees, after the sale to Dew, could not affect or prejudice Dew, or in any way amount to a confirmation of the tenure. A party laying out money in the purchase of

<sup>(</sup>a) 2 Sch. & L. 549. (b) 2 Vern. 279. (c) 1 Sch. & L. 52.

property with a knowledge of a defective title, cannot acquire a right to a specific performance: Robertson v. St. John (a). The evidence shews, that the rent reserved was not the best or most improved rent. The evidence also shews, that there was great mismanagement in the cultivation of the farm. The plaintiff is not entitled to a specific performance, inasmuch as the performance which he seeks is in direct opposition to the contract, by which it is stipulated that the property shall not be assigned without license, and it is not pretended that there has been any license to assign.

With respect to the question of assignment, one would have thought à priori, with Lord Redesdale, that every contract for a lease was personal, and that an objectionable tenant could not be forced upon the lessor. But it must be admitted that, in Crosbie v. Tooke (b), and Rhodes v. Morgan (c), Lord Cottenham adopted a different course. The Vice-Chancellor.—The principle of those cases is, that the assignment leaves the original lessee still liable on his covenant.] But even those cases recognise two exceptions from the general assignability of the contract, both of which it is submitted apply to this case; namely, one where a personal motive has been the cause of the agreement; the other, where, as has been already mentioned, there is a proviso against alienation. Now, here Mr. and Mrs. Bernard contemplated a lease to John Dowell, and no one else. The words of the agreement of July, 1835, if it can be called an agreement, are purely of a personal nature, and applicable to him alone. The Court, therefore, will be astute in such a case to adopt the principle acted upon by Lord Manners in Flood v. Finlay (d). that case, there was nothing on the face of the agreement to shew that Blackwood's personal accommodation was intended, but parol evidence of that intention was held suffiDownLL O. Drw.

<sup>(</sup>a) 2 Bro. C. C. 140.

<sup>(</sup>c) Id. 435.

<sup>(</sup>b) 1 Myl. & K. 481.

<sup>(</sup>d) 2 Ball & B. 9.

Dowell Drw.

cient to avoid the assignment. In reference to the other exception, it is submitted that Wetherall v. Geering (a), and Buckland v. Hall (b), are quite sufficient for this Court to act upon in refusing specific performance of the contract, and leaving the plaintiff to his remedy at law. The extraordinary jurisdiction of this Court will not be exercised in favour of a person who has taken an assignment of a thing which is not in equity assignable.

But, lastly, the undertaking of July, 1835, was not in execution of the power of leasing, and was in itself inoperative as an agreement. It was not in execution of the power, because reversionary. In Shannon v. Bradstreet the same objection was taken, but there the execution of the power was only two days prior to the expiration of the existing lease, and de minimis non curat lex. But what necessity is there, that an agreement for a lease should precede the lease itself eighteen months? It is clear that. in 1837, a larger rent than that reserved by the contract might have been obtained. The evidence of Mr. Bernard shews that the transaction was an improvident exercise of the power so far as concerned the reversioner, and an excessive execution of it as regards the terms of the power. Besides, a married woman is not sui juris as to property over which she has only a power. Supposing, however, the power to have been well executed in point of form, the memorandum of July, 1835, was not an agreement, but a mere one-sided undertaking, for which there was no consideration. The continuance in possession by the tenant was no part performance of it: Morphett v. Jones (c). The consent of the defendant was necessary to its completion: and, under such circumstances, conceding that he purchased with notice of an invalid charge, he was not bound to give effect to it: Doe v. Archer (d); Muskerry v. Chinnery (e); Lufkin v. Nunn (f).

<sup>(</sup>a) 12 Ves. 504.

<sup>(</sup>b) 8 Ves. 92.

<sup>(</sup>c) 1 Swanst. 172.

<sup>(</sup>d) 1 Bos. & Pull. 531.

<sup>(</sup>e) Lloyd & G. t. Sugd. 185.

<sup>(</sup>f) 11 Ves. 170.

Mr. Russell, in reply.

Dowell Dew.

THE VICE-CHANCELLOR.—The first question to be considered is, whether the plaintiff's case fails on the ground of the coverture of Mrs. Bernard, who was a married woman when she signed the agreement in question, and during the remainder of her life.

I think this circumstance not material as the case stands. She was tenant for her life, or for the joint lives of herself and her husband, for her separate use, with or without power of alienation, but with the power of leasing in question; which legally, at least, was not a power annexed to the life estate.

To the legal or equitable validity of such execution by her of this power, it is, I apprehend, clear, that her coverture was no impediment, that no fine, no separate examination was or could be requisite, that the concurrence or approbation of her husband or his assignees was not material; and, it being clear that an unmarried tenant for life, with a power of leasing, can equitably bind the estate by a written contract to execute the power, though omitting the formalities prescribed by its terms. I do not see any substantial distinction for the purposes of this suit between such a case and the present, especially where there has been mutual part performance, as in this case I think there was, in the interval between the expiration of the old lease and the death of Mrs. Bernard. The only question here is whether the estate is bound. And I conceive, that subject to the points to be mentioned, it did come bound into the hands of Mr. Dew; whether Mrs. Bernard did or did not bind herself personally, so as to expose herself to a personal decree, is, I conceive, upon the principles recognised in Tollett v. Tollett (a), Pollard v. Grenvil (b), Vernon v. Vernon (c), Doe v. Weller (d), Shannon v. Bradstreet (e),

<sup>(</sup>a) 2 P. Will. 489.

<sup>(</sup>d) 7 T. R. 478.

<sup>(</sup>b) 1 Ch. Ca. 10.

<sup>(</sup>e) 1 Sch. & Lefr. 52.

<sup>(</sup>c) Ambl. 3.

Dowell v. Dew.

and other cases not material to the present question. She signed and never objected to the agreement. It was in part performed by her and by the tenant, and if its terms were not contrary to the power, the assignees, or Mr. Dew, might, I conceive, have enforced it against him after her decease (a).

It is then argued, that there was no consideration for this agreement—that it was merely nudum pactum. It is not, however, considered requisite in this Court, that an agreement should at the time be binding on both parties; it is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other. agreement in this case was to demise for a certain rent to be paid, and under certain covenants to be entered into and performed. Now, if Mrs. Bernard had died before the time at which a lease under the agreement could with propriety have been granted, the agreement possibly could never have been carried into effect. In point of fact, however, she did not do so. The old lease, the expiration of which was a preliminary to the commencement of the new demise, expired in February, 1837. Mrs. Bernard lived more than three months afterwards. The tenant under that agreement was in possession under the former lease at the date of the agreement, and continued in possession in that character up to the time of the expiration of the old lease. From that time his possession was only referable to the new agreement; and without laying too much stress on those acts done on the farm, between the agreement and the death of Mrs. Bernard, which are proved to have been done solely with reference to the new agreement and by reason of it, it is sufficient to say, that this agreement was in part performed by the continuance of the possession of the tenant after the ex-

fully than he did in Court, the above is, with his permission, taken from that source.

<sup>(</sup>a) The Vice-Chancellor having, in his note-book, stated his reasons upon the first point in this case more

piration of the old lease until the death of Mrs. Bernard; at the time of her death she was in a condition to have enforced the performance of the agreement in equity against him by reason of that part performance. The continued possession was, it may be added, at no unimportant period of the year for a farmer, between Candlemas and the middle of May, at which period Mrs. Bernard's death happened. I think, therefore, that this forms no objection to the plaintiff's case.

It is then said, that the contract was future in its nature, and the prohibition against reversionary leases and the authority of the case of Harnett v. Yeilding are cited in support of that argument. To the case of Harnett v. Yeilding I entirely accede; the decision there did not depend on the question of the agreement having been a fraud on the power, and would have been equally right if that ingredient had not formed part of the case: but even if that circumstance had been the main foundation of the decision, I should have thought the present case not affected by it. In Harnett v. Yeilding there were two agreements: the first was for renewal at any time on request during the life of the tenant for life; and the second, on which the bill seems mainly to have proceeded, was one, as I have always considered the report, utterly unintelligible in its nature. In the present case a lease for 14 years of a large farm was to expire at Candlemas, 1837. In the summer of 1835, it being obviously material to the tenant to know what he was to do, both with respect to his mode of treating the farm, and with respect to the disposition of himself and his capital after the expiration of the term, and it being equally material to the landlady to know how she was to stand with respect to her farm after the termination of the lease in February, 1887, the agreement is made for a renewed lease, at the old rent, after the expiration of the term. There is nothing to impeach the fairness of the agreement, and admitting,

Dowell Dew. Dowell v.

for the purpose of the argument, the rent to have been sufficient in the Spring of 1837, and the covenants proper, I do not see any rational ground upon which such a contract ought to fail. I think the lapse of time between the agreement and the expiration of the old lease nothing beyond that which is ordinary and reasonable. Therefore, supposing the rent and covenants sufficient, and supposing no act to have been done in material contravention of the agreement, but that all things in other respects had remained the same, and that this bill had been a bill by John Dowell, the original tenant, no effectual resistance to the relief sought could, in my judgment, have been offered.

There are, however, of course, points assumed for the purpose of the observations which I have made, that remain to be considered. It is said, that the present bill is not by the tenant with whom the agreement was made, but by some person to whom he has assigned, or to whom he is alleged to have assigned, that such an assignee cannot come to the Court under any circumstances for the performance of the agreement, and that if he could there is no proof here of a valid or a fair assignment. Now, the question of the effect of the covenant against assigning does not occur here, that belongs to another part of the argument; for, if the covenant against assigning without license has been legally and equitably broken, and not the breach waived, the case must fail on another ground. I apprehend that, subject to that objection, the agreement was assignable, and especially with the assent contemporaneous or subsequent of the landlord for the time being. It is another question, whether the landlord is to be compelled to grant the lease to the assignee without the benefit of the personal responsibility of the original lessee for which he contracted: I am of opinion, in the circumstances of this case, that the plaintiff is not so entitled; and that though, if the case be free from all other objection, Thomas Dowell will be entitled to have a lease granted to himself; yet he will not be

so entitled without giving to the landlord, if the landlord shall require it, the personal liability of John Dowell for the covenants. Before, therefore, doing any thing in favour of the plaintiff, I must require an undertaking to that effect, which, no objection having been taken for want of parties, will satisfy me.

Dowell Dew.

The next contention is, that there was no assignment. Looking, however, at the evidence of John Dowell; looking at the evidence of Higgins, a neighbouring farmer and old acquaintance of the family; looking at the letter of the sister which has been produced, though I do not place much stress on that, except as it may seem to rebut any imputation or inference of fraud; and looking at the continued possession, the conduct of all parties, and the general aspect of the case; I am of opinion, that it is sufficiently made ont that there was a fair and sufficient contract for assignment and sale between the brothers in the summer of 1837, which I think was the date stated by the parol evidence—a contract probably not committed to writing until that period of 1839 which followed the dispute raised by Mr. Dew, as to the validity of the plaintiff's title. I am of opinion, that this fact is established, and that I am bound to treat Thomas Dowell, in this cause, as an assignee of the interest of John Dowell from July, 1887, clothed with possession and open to no objection, except that to which I shall presently come, of the proviso against assignment without consent.

The next question is, whether the lease which was agreed to be granted was conformable to the power; and, of course, if it was not conformable to the power, it would be useless and improper to grant any relief. It is another question how the Court is to arrive at the conclusion, whether it was or was not conformable to the power.

Now, I do not understand that the answer raises any issue with regard to the sufficiency of the covenants: and, therefore, for the purpose of this suit, at

Dowell Dowell Dew.

present I must take it for granted, that there is no such objection, not, however, meaning to preclude the landlord from raising any such question hereafter, if he thinks fit. As to the rent, it is obvious that, in a case of difficulty, this is a question which, from its nature, cannot be very satisfactorily discussed and considered by a judge in equity, without the assistance of a jury, or the opportunity of seeing and hearing the witnesses. There must be great risk of a failure of justice in such a course. Still, I agree, that courts of equity are judges both of fact and law; and, with a well-known exception, it is generally in their discretion, whether they will act for themselves without assistance—a discretion I agree to be exercised not arbitrarily but judicially, after the Court has become informed of the evidence. The particular subject, however, which a court of equity has to consider, must have its bearing on the discretion which the Judge has to exercise. Now, this is a question as to the value of a farm: whether the rent fixed in 1835 was a fair rent in 1835 or in 1837, when the lease was to commence. The case is that of a married lady, tenant for life; the husband a man of business, (for I think Mr. Bernard had been a banker), in the prime of life, probably of mature judgment and sufficient in every respect for the conduct of his affairs; Mr. Bernard's circumstances, it is obvious, rendered income very material to him: prima facie these are reasons (by no means conclusive reasons) against supposing that the rent was too low. Mr. Bernard himself is examined as a witness, and states distinctly, that in his opinion and judgment the rent was a fair rent, with which he and his wife were and would have been satisfied. The farm is variously stated at quantities, ranging between 500 and 515 acres; the rent is £525. Mr. Price, who appears to be a considerable yeoman in the neighbourhood, and to be a man of respectability and a practical man, values the farm, one acre with another, all round, at £1 per acre, which would certainly bring the rent rather under than over £525 per annum. James Chambers, who, I think, was married to a deceased sister of the plaintiff, gives the same valuation of it. There is, however, in the plaintiff's evidence certainly one remarkable circumstance, namely, that Evan Williams agrees with Price and Chambers as to the sufficiency of £1 an acre all round as applicable to the year 1835, but he says that the year 1837 was better; and as to the year 1837, he, the plaintiff's own witness, puts the rent at £585 per annum—£10 a year more—not a very material amount perhaps, perhaps not an amount on which a jury would come to a conclusion against the lease, but there the statement is among the plaintiff's evidence.

Now, the defendant has met this evidence by testimony which, probably, I do not overstate, when I say that primd facie it seems of more weight. Mr. Williams, who appears to be an experienced land agent and surveyor, takes the quantity as given him by Mr. Dew at 507 acres and a fraction, and he values it, with a singular minuteness perhaps open to observation, at 6971. 8s. 5d. The next witness is Bluck, a farmer. He appears to have taken the quantity from Tench, whom I consider as Mr. Dew's agent; and oddly enough, though Mr. Dew gives Williams the quantity at 507 acres and a fraction, Tench gives it to Bluck at 513 and a fraction: Bluck values the farm at 11. 7s. an acre all round, which would be between £690 and £700 a year, coming very near Williams's valuation. Tretheuty, a land agent, gives £680 a year. Plant, a farmer, gives 11.6s. an acre all round. Tench, the agent of Mr. Dew, gives 6671. 8s. Fosbrook, a surveyor, who says that he had the quantity from Mr. Dew, as 514 acres and a fraction, gives £6511.6s.

It is impossible not to be struck with the great variety of valuations given by these witnesses, which I mention as shewing the impossibility of easily arriving at any certain conclusion—an observation (certainly having stronger facts Dowell Daw.

Dowell Dowell Dew.

to support it) which was made, I apprehend, not without effect, in an important case in the House of Lords, where a large property in the neighbourhood of London, said to have been leased at an undervalue, was valued by various surveyors, and one of the persons who had to advise on that occasion, was so struck with the discrepancy, that he caused a tabular representation of the various valuations, all on one side, to be made; each surveyor being entitled to equal credit, when their valuations were brought together in this form, they had an appearance which rendered it difficult to treat them seriously. I agree, that the difference there was much greater than the difference here: still, I say, that weighing not merely the number, but the number as well as the probable relative weight of these witnesses, and having particular regard to a witness, whom I have not yet mentioned, namely, Mr. Godsell, the immediate predecessor of the plaintiff's father in the farm, who held it up to 1828, at a rent of £700 a year, and whose valuation is £675 a year, I should, if placed under the necessity, by my view of the duty belonging to me, of deciding on this evidence, feel myself probably obliged to decide the point of value in favour of the landlord, and against the tenant; but I cannot help seeing that it is very possible that I may take an erroneous estimate of such a subject. cannot help seeing the vast advantage to justice possibly derivable from an oral examination of these witnesses before a judge and a jury, and from observing their demeanour; knowing, as I do, how frequently it has happened that a case, apparently strong in favour of one party on written evidence, has ultimately come out as strong in favour of the other party, not merely upon an oral examination of the witnesses already examined, but on the examination of further witnesses: nor can I avoid recollecting also, that, if on my view of this evidence, I decide against the plaintiff, he is utterly remediless, except by appeal from my judgment, and must instantly be turned houseless on the world

from this farm which his family has held for twenty years. I am struck, I confess, with the danger of allowing my own judgment to operate for the purpose of final decision against him, upon such a case as the present, and I consider myself bound to send the matter to a jury.

I have entered thus largely into the evidence, because I hold it generally to be the duty of a judge in equity, before he abstains from deciding on a matter of fact, to consider the evidence fully from the beginning to the end, and then, and not till then, to ask his own conscience, judicially, whether he is in a safe position to decide. I am of opinion that I am not. The question must go to a court of law, wholly unprejudiced by my observations, which I have made for the reasons only that I have mentioned. I consider it very possible, that, even on an examination in open court of the present witnesses, to say nothing of the possible production of others, the aspect of the case may be importantly changed.

We come next to consider whether the acts done have amounted to that which would have been a forfeiture of the lease, if a lease had been granted; and it is of course plain, if this Court were satisfied that the lease, if granted, would have been forfeited by breaches of covenant, that it would be impossible to direct such a lease to be granted. It is another question, how the Court is to arrive at that satisfaction.

Now, not to consume too much time in delivering the reasons which I feel it my duty, to some extent, to deliver on this part of the case, I may very shortly dispose of one head of breaches of covenant—namely, the allegations of want of repairs and of improper cultivation. The evidence on the part of the plaintiff, on this subject, is not confined to the witnesses whom I have mentioned. It would, as general evidence, if unmet, be satisfactory and sufficient to shew, that the farm had been properly treated and conducted.

Dowell Dowell Drw. Dowell Dowell Dew. On the other hand, there is strong evidence on the part of the landlord, and going into more particulars, the other way. The observations, however, that I have made as to the danger and difficulty of deciding in a court of equity finally on the notion which the Court may entertain of the effect of conflicting written evidence as to the sufficiency of rent, bear with much more strength on the question, whether this Court is in a condition satisfactorily to decide on the repairs and management.

We must recollect also, with reference to what these witnesses state, that, as early as June, 1839, Mr. Dew had served a notice to quit, and probably he is not entitled much to complain, if, after he had thus endeavoured to throw off the burthen of the lease, and to deprive the tenant of it, the tenant somewhat held his hand with respect to expenditure under the covenants. Another very obvious observation is this, that if the particulars of the repairs and management of a farm were to be viewed in a strict and literal manner, there would be endless war throughout the country between landlord and tenant; no tenant could hold a farm in safety. It has been a very old principle of the law to disregard unimportant matters of When Lord Eldon was in the Common Pleas, an application, if I recollect right, was made to that Court in an action of waste in which there was a verdict, I think with a farthing damages, to convert the judgment into a judgment for the defendant; Lord Eldon was very much struck with it, and at first objected; but he was satisfied, by old authorities, that that had always been the course. It is also a mode of viewing the subject which juries take still more largely; in some cases perhaps too largely, in others not unwholesomely for justice; for if, according to a literal interpretation of strict covenants, a tenant was to be ejected for a foul turnip-field, an unhinged gate, a broken shutter, or small matters of that description, which frequently occur on the best-managed farms, there would

scarcely be a lease in existence throughout the kingdom. It is necessary that in these cases, juries and judges should make a reasonable allowance, and not put too strict and precise an interpretation on such covenants. Now, there is the evidence of surveyors; and when I began to read a catalogue of defects given by one at least of these gentlemen. I was struck with its apparent bulk; but when I came to the conclusion of the list, I found that the summing up was about £280. It is, however, not new. No man who has ever been a householder or landholder is a stranger to this kind of operation. An occupier of a house or a farm may be constantly laying out money upon it, allowing no seeming want of repair to go unremedied, fancying the property to be in the best order and condition; let a surveyor be called in as to the state of repairs, and a thick volume of defects in and out of the house will be the probable result. I do not, myself, I confess, pay any very great attention to the list of dilapidations which is given by the surveyors here. That is, however, a matter which may most properly be submitted to a jury, and to a jury it must go. I feel myself utterly unable, on the evidence, to decide as to their extent, or materiality, or immateriality.

The only remaining question, I believe, is, as to the effect of the assignment without license, and the underletting to Price. On the underletting to Price, it must be observed, however, that it is not put in issue; and although breaches of covenant are alleged in the answer, yet the answer goes on to specify the character of those breaches, and the underletting to Price is in no manner in issue; it comes out incidentally on examining Price as a witness: and I should therefore run the hazard of doing the greatest possible injustice, if, on that ground only, I were now to decide that there has been a forfeiture of the lease. It is said, however, and truly, that John Dowell agreed for a lease subject to the obligations of the old one, including a provi-

Downell v.

Dowall Dew.

sion on pain of forfeiture against assignment except by license under hand and seal; and without any license in writing he assigns to Thomas Dowell in the month of July, 1837. Such a breach, however, it is plain, may be waived. An underletting may or may not be what is called a continuing breach, on which, perhaps, all the authorities do not agree; but I apprehend an assignment is a breach once committed, and for all; and if, therefore, after the assignment to Thomas Dowell, Thomas Dowell was accepted as the tenant, that matter is waived. Now, am I to say that there is no evidence in this case, that Thomas Dowell has been accepted as tenant, and therefore that the breach in this respect has not been waived? my opinion, there is very strong evidence that he was. It is said by Mr. Dew, that the payment of rent to the assignees was after his equitable title had commenced. ther it was or was not so, perhaps, does not very clearly appear; but Mr. Dew has received rent himself from this very man; and I have the assignees themselves, when advertising the estate for sale—the sale at which, or under which, Mr. Dew bought, describing Thomas Dowell as being in possession under this agreement. A judge and jury may take such a view of that matter as they may think just and right; but it is impossible that I can decide on this evidence that that breach has not been waived. And upon this head also one observation arises with regard to the evidence of Price, which may introduce a nice question: it may do so-I give no opinion upon it. proviso against assigning or underletting without license may or may not have been waived finally and completely, if waived partially—a point as to which Dumpor's case (a) and other authorities at once occur to our recollection. Now according to Price's evidence, if it is to be relied on, Price was actually in possession of the underlet piece of land lying at a distance from the farm, at the time when the agree-

(a) 4 Rep. 119 b.

1842.

DOWELL

DEW.

ment of July, 1835, was entered into, he has ever since continued in that possession, and has been so till the present time. The question of waiver may apply not merely to the underletting to Price, but may go deeper. On that, however, I give no opinion; it is a purely legal question. When that question, however, comes to be considered, it may be found useful to refer, not merely to *Doe* v. Bliss (a), but to earlier authorities, which were not cited in this case: I mean Whitchcot v. Fox (b), and the case in Lord Mansfield's time in Mr. Cowper's reports (c), as well as a much more recent case of Doe v. Pritchard (d).

I have alluded to the particulars of sale. It has been argued by Mr. Russell, and very properly argued, though I do not agree in the conclusion which he drew, that the assignees have so conducted themselves by their agent Rose, and otherwise, as to preclude themselves from objecting to the lease, at least on the ground of the amount of rent, if not further, and that they being precluded, Mr. Dew would be. I cannot, however, consider that to be the effect of what the assignees have done. The argument must assume before it has any place, that there was no originally binding agreement. What pretence is there for saying there was a new agreement? Before there could be confirmation, even if the Statute of Frauds were out of the question—before there could be confirmation, you must shew that the assignees intended to confirm with knowledge of the infirmity in the title; in which points, the case is, as it appears to me, deficient; and the particulars of sale, though they are very good evidence against them, as any declaration would be, that they knew of Thomas Dowell being the tenant, and knew that he was tenant under an agreement, and were selling the property not objecting to it, cannot I think amount to a contract in favour of the tenant, nor can the language of the conveyance to Mr. Dew, as I con-

<sup>(</sup>a) 4 Taunt. 735.

<sup>(</sup>c) Probably Goodright v. Davids, Cowp. 803.

<sup>(</sup>b) Cro. Jac. 398.

<sup>(</sup>d) 5 B. & Ad. 765.

DownLL DownLL DEW. ceive, have that effect. The question of the validity of the agreement of 1835 is, I conceive, fully open to him.

The decree pronounced was this:—

DECLARE that it appears that John Dowell, before and at the time of the date and signature of the agreement of July, 1835, and from thenceforth until and at the time of the death of Mrs. Bernard, was in possession and occupation of the farm as tenant under the lease of 1823, and under that agreement subject as to such part, if any, thereof, as was held by William Price under the said John Dowell, as tenant to him, to such under-tenancy, if any, of the said William Price. And it appearing that Mrs. Bernard lived until some time in the month of May, 1837, and therefore some months after the expiration of the term demised by the lease of 1823-Declare that the agreement of 1835 was (subject to the question of the sufficiency of the rent made payable, and the covenants provided by such agreement) a good equitable execution of the power of leasing given or reserved to Mrs. Bernard by the settlement; but such declaration is without prejudice to the said questions as to the rents and covenants. Continue the injunction until further order, but without prejudice to the leave given to proceed at law, as after mentioned, the plaintiff continuing his former undertakings, and undertaking to treat and manage the farm in a proper and husbandlike manner, and undertaking that John Dowell shall join in the lease, if a lease shall hereafter be granted. And the defendant, John Dew, alleging the insufficiency of the said rents and covenants, and alleging that breaches of covenant have been coinmitted which are not relievable in equity, and have not been waived, let the defendant Dew, within six weeks, bring an action of ejectment on his own demise for the purpose of recovering the possession of the farm; the plaintiffs in equity not to set up any objection on the ground of want of proof of a notice to quit prior to June, 1839, or on the ground of any waiver or supposed waiver of any such prior notice, but that is to be without prejudice to any other question between the parties in the action as to the effect of any conduct of either party or otherwise; and let the plaintiff become the defendant in such action; and let the parties so proceed therein as to enable issue to be joined in such action before the end of Trinity Term next; and let either party be at liberty to proceed to judgment in such action, but execution therein is hereby stayed until further order: and let all the exhibits in this cause be in Court at the trial of such action; and let all or any of them be produced in evidence at such trial, upon the request of either party, saving just exceptions; and, in the meantime, let either party be at liberty, at his own expense, to have copies of the said exhibits of the other parties: and let it be admitted by each party at the said trial, for the purposes of the action, that Mrs. Bernard's death happened on the 15th of May, 1837; Mr. Bernard's bankruptcy in the year 1832; the consequent title of his assignees thereunder to his life estate, and the names of such assignees; the settle-

ment, the lease of 1823; the fact that John Dowell, as the personal representative of the lessee, was entitled to the benefit of that lease before and in July, 1835; the signature by Mr. and Mrs. Bernard in July, 1835; the agreement of that date, the particulars of sale and contract with Mr. Dew, and the conveyance to him. Let it also be admitted on the trial, for the purposes of the action, that on the 3rd of February, 1837, in pursuance of the agreement, Mrs. Bernard, with the intention of performing the same, and of acting in due exercise of the power of leasing conferred by the settlement, executed an indenture of lease to John Dowell of the farm for the term, at the rent and with and under the covenants and provisions required by the said agreement; that she duly executed such lease with the formalities required by the power, and that John Dowell duly executed a counterpart thereof; and that such indenture was dated the 3rd of February, 1837; and, except as necessarily varied by the difference of date, the different commencement of the term and the different name of the lessee, was conformable in all respects to the lease of 1823; and that all the estate and interest of John Dowell, under the agreement of 1835, and under the indenture of 1837, were by deed assigned by him to the plaintiff, Thomas Dowell, in July, 1837. And the defendant, Thomas Dew, is not to take any advantage on such trial of any breach of covenant subsequent to serving the notice to quit of June, 1839, or of the non-payment, or any failure in payment of rent. And the plaintiff in equity is not to take any advantage on such trial of any receipt of rent, by or on behalf of Mr. Dew, subsequent to the filing of the bill in this cause. Reserve further directions until after judgment in such action. Reserve all costs, here and at law, with liberty to apply. And let there be directions as to witnesses in this cause, dead or unable to attend, as in the case of an issue; and continue the order as to the rent, and the plaintiff's undertakings until further order. And let the defendant Dew, within six weeks from this time, cause to be delivered to the plaintiff in equity, or his solicitor, full particulars of such, if any, breaches or alleged breaches of covenant, and such, if any, acts or alleged acts of forfeiture, and such, if any, acts as he shall contend to have entitled him to re-enter, as he intends to rely upon at the trial; and the periods within which he contends that the same were committed, and the particulars also, if any, and the instances and reports, if any, on which he intends to allege the lease to contain insufficient covenants. And in the event of obtaining a decree for specific performance, the plaintiff to undertake to put the farm into repair and order according to the covenants within six months afterwards; and to abide by such order as to the rent for the time past and to come, as this Court shall think fit to make; and in such event as aforesaid, the plaintiff and John Dowell severally undertaking, that John Dowell shall join in such lease as this Court shall direct to be executed, and be liable for the rent and covenants therein to be reserved and contained. And the plaintiff in equity consenting, let him be ordered not to remove from the farm more than two-thirds of the present corn crops therein without the leave of the Court, till further order.

Dowell v.

1842.

March 4th.

On a bill filed against an executor, seeking to charge him in respect of devastavits committed by his co-executor. who had died, the defendant, by his answer, denied that he had ever interfered in the testator's affairs in the lifetime of the co-executor; and it was admitted that he had not proved the will till the death of that executor: -Held, nevertheless, upon the evidence of two witnesses, speaking to different facts, but corroborated by circumstances, more especially by the fact of a composition deed having been executed by the surviving executor with the executor of the deceased, that there was a sufficient ground for inquiring into the acts of ingly directed special enquiries on the subject.

## JAMES v. FREARSON.

AGNES TAYLOR being seised and possessed of considerable real and personal estate, by her will dated the 8th March, 1816, after bequeathing to Esther James her household goods and furniture, gave, devised, and bequeathed all her ready money, securities for money, book debts, &c., and all other her property, real and personal. to her nephew James Frearson, the son of the testatrix's late brother John Frearson, John Dickenson, and Francis James, their heirs, executors, and administrators respectively, according to the nature of the said estates, upon trust that they or the survivors or survivor of them, and the heirs, executors, and administrators of such survivor. should collect, get in, and convert the same into money. and thereout pay her funeral expenses and just debts, and after paying £100 to Esther James, invest the clear residue in the public funds, or on real security, and out of the dividends and interest of such funds and securities, apply a sufficient sum towards the support and education of James Taylor James, the son of Esther James, until he should attain the age of 21, and upon his attaining that age to pay and transfer to him all such principal monies, stocks, funds, and securities; and in case he should die under 21, to pay and transfer the same unto and amongst the children who should be then living of the testatrix's brother, John Frearson, in equal shares. The will contained a declaration that the trustees should not be charged or chargeable with any more of the monies and premises than they respectively should actually receive, and that one of the surviving executor. The them should not be answerable or accountable for the other of them, but each for his own acts and defaults only.

> The testatrix died on the 26th May, 1816, leaving the several persons named in her will surviving her. Esther

James in 1827 married Edward Newby. John Dickenson died in December, 1823, having by his will appointed his wife Elinor Dickenson his sole executrix, who proved his will, and died in the year 1825, leaving Benson Harrison her executor, who duly proved her will. James Taylor James attained the age of 21 in July, 1836.

The bill was filed by James Taylor James against James Freerson and Francis James. It stated that the defendants and Dickenson, who was an attorney, upon the decease of the testatrix accepted the trusts of the will, and took upon themselves the execution of it; that the farming-stock and other personal estate of the testatrix was sold by auction on behalf of the executors, and that the defendants attended and sanctioned the sale; that the monies got in on account of the testatrix's estate, including the monies arising from the auction, were received by Dickenson, with the sanction and permission of the defendants; that Dickenson out of such monies paid the debts and funeral expenses of the testatrix and the legacy of £100, but that he never invested the residue, though amounting to upwards of £4000, for the benefit of the plaintiff, nor ever allowed him any maintenance, nor ever proved the will; that the defendants took no steps to compel Dickenson properly to perform the trusts of the will, although he acted and professed to act on behalf of himself and the defendants; that the defendants had since Dickenson's death proved the will; that the defendant James, on several occasions in the lifetime of Dickenson, received considerable sums of money from Dickenson, or his clerk Sykes, on account of the testatrix's estate; that the amount of these sums had been, in breach of trust, retained by the defendant James, with the privity of the other defendant, and secured, as they pretended, by a mortgage of an estate of James; that Dickenson's estate was insolvent, and that the defendants had entered into a composition with Benson Harrison, the representative of Dickenson, under

JAMES

U.
FREARSON.

JAMES

JAMES

FREARSON.

which they had received an inconsiderable dividend on account of the testatrix's estate, and that since the execution of that deed, Benson Harrison had received nothing on account of Dickenson's estate.

As evidence (in addition to what has been previously stated) that the defendants acted in the executorship before the death of Dickenson, the bill alleged, that on the occasion of the testatrix's funeral, her will was read over to the defendants and the assembled relatives, and that neither of the defendants made any observation expressive of an intention not to accept the trusts; that the sale of the testatrix's effects was advertised in the usual manner: that both the defendants were present at the sale, and took part therein as executors; and that during the life of Dickenson, and while he acted or professed to act as executor, the defendants called several times at his office to enquire into the state of the affairs of the estate of the testatrix, and to require from him an account of the monies paid and received by him on account of the estate, and that latterly they were unable to see John Dickenson, but saw his clerk Sykes.

The bill prayed, that an account might be taken of the personal estate of the testatrix possessed by Dickenson, or which but for his wilful default might have been received by him, and that it might be declared that the defendants were severally liable for the sums received by Dickenson, and not accounted for by him, and might be decreed to make good the same; and that an account might be taken of all sums received by each of the defendants on account of the testatrix's estate, with half-yearly rests, and £5 per cent. interest on the balances from time to time appearing to be in their hands, and they might be decreed to pay the same; and that in case either of them should appear to be insolvent, that each should be declared liable for the amount found due from both, and should be decreed to pay the same.

The defendant Frearson, by his answer, denied that he did upon the death of the testatrix accept the trusts of the will, or that he had undertaken the execution thereof, until after the death of Dickenson; for knowing that Dickenson had been the confidential agent and adviser of the testatrix, and that he was then employed as such agent and adviser by Esther James and Francis James, who from their near connection with the plaintiff, were the proper guardians of his interests, the defendant forbore to interfere in any manner in the executorship during the lifetime He admitted that, on the death of Dickenof Dickenson. son, he was requested by Mrs. Newby (formerly Esther James) to undertake the trusts of the will, and he then discovered for the first time that Dickenson had not proved the will, but had acted as executor and had called in the testatrix's mortgages, and converted into money the rest of her personal estate, and mixed the proceeds with his own monies. The defendant then stated, that under such circumstances he was unwilling to undertake the executorship, but to prevent the total loss of the estate he did so, and he accordingly, together with the defendant James, proved the will. He further stated, that having taken upon himself the executorship, he took legal advice · as to whether he should file a bill against Benson Harrison for the recovery of what was due from Dickenson, but upon being informed that Dickenson's estate was insolvent. he forbore to take that step; and he admitted, that after an investigation of Dickenson's affairs, and after several meetings of Dickenson's creditors, at one of which the balance due from Dickenson's estate to that of the testatrix was, upon an examination of the aecounts, found to be £4180, he the defendant, and the defendant James, did, at the request of Mrs. Newby, who took an active part at the meetings, execute to Benson Harrison, in conjunction with the other creditors of Dickenson, a deed of composition, bearing date the 19th November, 1831, under JAMES
v.
FREARSON.

JAMES
J.
FREARSON.

which two dividends of £1465 and 1391. 13s. (latter being understood to be a final dividend) were received on account of the testatrix's estate. The defendant denied all knowledge, till after the death of Dickenson, of the payments made by Dickenson and Sykes to the defendant James: but he stated, that upon those payments coming to his knowledge, he required a security from James, and finding that he had no better security to give, he admitted that he had taken from James a mortgage for £1000, the amount of three sums and interest, advancing to James. out of the testatrix's estate, £200 in addition, in order to pay off a former mortgage, and thereby, as the defendant submitted, to better the security by getting in the legal estate. And he alleged that he had always been ready and willing, and had frequently offered, to assign the mortgage to the plaintiff, and in the meantime to pay the rent (£39) He admitted that he was, as a relative of the testatrix, present at the reading of her will, and that he made no objection to the executorship. He also admitted that he, on his return from market, was present at the sale, but denied that he took any part in it as executor, or that he ever authorized advertisements in his name. He denied the whole of the allegations in the bill as to his calling with the other defendant at Dickenson's office, and as to what took place there. He did not, however, deny that he had ever, for any purpose, called at Dickenson's office.

The answer of the defendant James did not materially differ from the answer of Frearson, except that he admitted having gone to Dickenson's office in his lifetime on affairs of his own.

In support of his case, the plaintiff examined two witnesses. One of these, Mrs. Newby, stated that after the funeral of the testatrix, her friends returned to the house, when the will was read aloud by Isaac Dickenson, the brother of John Dickenson, both the defendants being present, and the names of the trustees and executors being dis-

either of the defendants refuse to accept the trusts; and that after the will was read Isaac Dickenson took it away with him. The deponent also stated, that the farming-stock and effects were sold by order of the trustees, who were both present at the sale in the capacity of trustees, and exercised acts of authority or ownership, by giving orders respecting the sale, namely, by ordering the deponent, who was resident in the house, to provide refreshments and make things ready; that on the day of the sale the deponent asked both defendants to give her a pig, &c., which they agreed to; and that when the defendants were in the habit of going to see John Dickenson, the defendant James used to call at the deponent's house on his return, &c.

JAMES

JAMES

T.

FREARSON.

The other witness, Sykes, deposed to several calls having been made by the defendant Frearson at Dickenson's office, during his lifetime, for the purpose of making enquiries relative to the affairs of the testatrix; and he also stated, that on one occasion both the defendants called together, but that Dickenson, by reason of illness, declined to see them: that nothing particular, however, was said on this occasion, except that James enquired generally how the accounts of the testatrix were going on.

Mr. Swanston and Mr. Romilly, for the plaintiff, referred to Mucklow v. Fuller (a) and Booth v. Booth (b).

Mr. Russell and Mr. Phillips, for the defendants, contended that there was no ground whatever for charging the defendant Frearson in respect of anything which took place before the death of John Dickenson.

THE VICE-CHANCELLOB.—Every step which has been

(a) Jac. 198.

(b) 1 Beav. 125.

JAMES 5. FREARSON. taken in the argument has only shewn it to be more and more absolutely necessary that an enquiry should be directed upon almost every point raised in the pleadings.

The plaintiff, who attained his majority in 1836, and filed his bill in 1839, sues as the residuary legatee of a testatrix who died more than twenty years ago. The defendants are the surviving executors and trustees of the testatrix. The subject-matter of the transactions in question is only personalty. The defendants were relatives of the testatrix, who carried on the business of a farmer, and appears to have been wealthy. Dickenson, one of the trustees and executors, was a professional gentleman, and probably concerned for her in her lifetime. Probably, for this reason the lady put him in the administration of her affairs after her death. It appears, however, singularly enough, that though the personal estate consisted of several thousands of pounds, and was not confined to farming-stock and matters of that description, there was no probate in the lifetime of Dickenson, who survived her several years, and died in 1823. Probate was, in the year 1825, taken out by the two defendants on the record. is clear, however, that during the years which elapsed between the death of the testatrix and that of Dickenson, the estate was administered by the defendants and Dickenson, or some or one of the three, substantially in the same way as if probate had been obtained. It appears that Dickenson, at the time of his death, had received several sums upon account of the personal estate, and was indebted to the estate in a large amount, exceeding £4000; and after the death of Dickenson, the defendants, having proved the will, appear to have entered into an arrangement with the representatives of Dickenson for the purpose of settling that demand, and receiving payment from the estate of Dickenson, by way of composition. We are, however, left in the dark during the six or seven years between the death of Dickenson and the death of the testatrix, as to

the particulars of the sum left in the hands of Dickenson. It is suggested for Frearson that he cannot be compelled to account for them, because, amongst other reasons, he did not prove the will till the death of Dickenson. From the absence of probate, however, in Dickenson's lifetime little is to be inferred, because, if there was no probate, matters went on as if it had been taken out in the usual way; and as to this or any other matter, the defendant has entered into no evidence in the cause, oral or documentary.

JAMES
v.

FREARSON.

On the part of the plaintiff two witnesses have been examined. One of them, the plaintiff's mother, was at the house at the time of the testatrix's death, and was present at some of the transactions which took place after her death; and if the evidence of the two witnesses is to be believed, no doubt they establish the fact, that in the lifetime of Dickenson, and at an early period after the death of the testatrix, Frearson had accepted the executorship. I say if it is to be believed, because Frearson has denied it. It is not proposed to decide, and I do not say that I shall now decide, that point; but to say in the face of the facts appearing from the evidence, more especially the fact of a large balance remaining in the hands of Dickenson at his death, followed by a deed of composition by his executors after his death, to say, as has been suggested, that there shall be no enquiry as to these circumstances, is a proposition of such a nature as it has seldom occurred to me to hear made in a court of justice. It is plain there must be an enquiry.

Before, however, I proceed to direct the enquiries, I may remark upon the meaning of the word "both," in the deposition of Mrs. Newby. It is clear that she meant both the defendants. Looking at the whole of her evidence it is impossible to think otherwise.

The transaction as to James, the other executor, equally demands enquiry. I have been anxious, as far as I could, not to express any opinion on the case, and I desire, in

JAMES

JAMES

O.

FREARSON.

sending it to the Master's Office, to have it understood that I express no opinion as to what ought to be the result of all the facts, after going before the Master. All I decide is, that it is a case for enquiry, with large and ample discretionary powers in the Master. The Registrar will take a note of there being no objection for want of parties.

Direct the ordinary administration accounts against the two defendants as if they were the only executors. Then let the Master enquire what parts of the testatrix's personal estate, if any, are now outstanding; and if any parts of the testatrix's personal estate are now outstanding, how long the same have been so, and under what circumstances. Enquire when, and by what person or persons, and in what character, and under what circumstances, all other parts of the testatrix's personal estate have been possessed, received, applied, and disposed of, and what has become thereof. Enquire and state what payments were properly made on account of the testatrix's estate, or in the course of a due administration thereof in the lifetime of the late John Dickenson, and when and by whom, and in what character, and to what amount. The Master, in considering what payments were so made, not to have regard to the probate not being produced. Enquire and report whether Dickenson in his lifetime ever, and when, first accepted the trusteeship or executorship of the testatrix's will, and whether in his lifetime he acted in that character, and when first, Enquire and report when first the defendants respectively accepted, or agreed to accept, the trusteeship and executorship of the said will; and whether the defendants, or either and which of them, ever, and when, first acted in such trusteeship or executorship in the lifetime of John Dickenson. Enquire and report in what sum and under what circumstances John Dickenson was indebted to the testatrix's estate at the time of his death, and by what means he had become so, and how long he had been so. Enquire and report when first the defendants respectively, or either and which of them, had notice that John Dickenson was indebted to the estate of the testatrix in any and what sum. Enquire and report whether the defendant, Francis James, was, at the time of filing the bill, indebted to the testatrix's estate in any and what sum of money, and by what means, and under what circumstances, and when he had become so, and how long he had been so, and when first the defendant Frearson had notice that James was indebted to the testatrix's estate in any and what sum of money. Enquire and state whether the defendant Frearson ever, and when, took any and what security or securities from the defendant James, in respect of any and what sum due from the defendant James to the testatrix's estate, and under what circumstances, and what, if any thing, has been produced thereby, and what, if any thing, the defendant Frearson received, and the value of such securities. Enquire under what circumstances the composition deed of the 19th November, 1831, was entered

into, and what, if any thing, has been received by the parties to this cause, or any or either and which of them, or by or for their or his order or use, under or by virtue of such deed, and whether anything now remains to be received thereunder. Enquire and state when the plaintiff attained his majority; when he first had notice of the composition deed: when he first had notice of the defendant James being indebted to the said testatrix's estate, and when he first had notice of the security obtained from James. Enquire and state whether any and what account or accounts was or were ever, and when, settled between the plaintiff on the one hand, and the defendants, or the defendants and Walker, or any or either and which of them, on the other, and of what nature and under what circumstances; and if the Master shall find any such accounts to have been settled, let him state all the particulars relating thereto, and whether, when the plaintiff settled the same, he had notice of all the material facts and circumstances relating to the subject thereof. Enquire and state whether any and what vouchers, or other documents or papers relating to the said testatrix's estate, or the administration thereof, were ever, and when, delivered to the plaintiff, or by his order or for his use, and by whom, and under what circumstances, and what has become thereof; and whether the defendants, or either and which of them, at the time of filing the bill, or at any time since, had in their or his possession or power any and what documents, papers, or writings relating to the said testatrix's estate, or the administration thereof. Liberty to state any special circumstances with respect to the acts and conduct of the defendants and Dickenson respectively, between the death of the testatrix and the death of Dickenson, or subsequently, relating to her affairs, or the administration thereof. Liberty to state special circumstances (if he shall find any) with respect to the acts and conduct of the plaintiff, in respect of the matters aforesaid, or any of them, since his majority. Liberty to state any special circumstances with regard to any of the matters aforesaid. Let the accounts and enquiries as to the testatrix's estate, and receipts and payments in respect thereof, be without prejudice to the effect, if any, to be given to any settled account or accounts. if the Master shall find any. Usual directions for discovery and production of documents. Reserve further directions and costs, with liberty to apply.

JAMES
J. FREARSON.

1842.

March 14th, 15th.

Testator bequeathed to A. and B., two of his three executors, so much purchase £6666 consols, which stock he directed should stand in their joint names, upon trust to pay the dividends to C. for life; the capital, after C.'s death, to sink into the residue. He residue, gave several pecuniary legacies, amongst which £5000 to B., and bequeathed the surplus residue to D. Upon the death of the testator, A. and B. purchased the consols, pursuant to the directions of the will. A. afterwards died, and then B. sold out the stock, and applied the proceeds to his own use:— Held, that quoad B. no appropriation was made of the stock, so as to separate it from

Morris v. Livie.

KOBERT LIVIE, the elder, by his will, dated the 20th of December, 1806, gave and bequeathed unto his brotherin-law, Alexander Champion, and his partner Robert Livie money as would the younger, the sum of £4000, upon trust that they and the survivor of them, and the executors or administrators of such survivor, should, as soon as conveniently might be after the testator's decease, lav out and invest the same in the public funds in their or his names or name, and should stand possessed thereof, and of the dividends thereof, upon trust to receive the interest and dividends when and as the same should become due and payable, and pay the same into the then, out of the proper hands of Catherine Primrose, the testator's sister, or to her assigns, for her sole use and benefit, free from the debts, control, or engagements of any husband whom was a legacy of she might intermarry, her receipts alone, notwithstanding such coverture, to be good sufficient discharges, &c.; and after her decease, upon trust to pay, assign, and transfer the said principal sum, and the stocks or funds wherein the same might be invested, and the interest and dividends thereof, unto her son Robert Primrose, if he should be living at the decease of his said mother, for his own absolute use; but in case he should die in the lifetime of his said mother, then the testator directed that the said principal money, and the stocks or funds to be purchased therewith, as aforesaid, should sink into and become part of the residue of his personal estate thereinafter be-And after giving several specific legacies, the testator gave and bequeathed all the rest and residue of

consequently, that C. and D. were entitled to be reimbursed ratably out of B.'s legacy of £5000 the losses which they had respectively incurred by means of B.'s breach of trust.

If an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore, if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust.

Banch Sheffield 1 De g m n 1 4 371

his estate and effects, subject to the payment of his debts and funeral expenses, and also the several legacies thereinbefore given unto the said Alexander Champion and Robert Livie the younger, their executors and administrators, upon trust that they or the survivor of them, his executors and administrators, should, as soon as conveniently might be after his decease, collect and get in the same, and after deducting all necessary expenses, should lay out and invest the clear residue of his estate and effects. from time to time, in some of the public funds, or upon real securities, as to them should seem best, in their or his names or name, and should stand possessed of all such stocks, funds, and securities, and of the dividends and interest thereof, upon trust, during the life of Jane Livie, the testator's wife, to receive the dividends, interest, and produce of the said clear residue, and pay the same unto his wife, or otherwise authorize and empower her to receive the same during her life, for her own sole and absolute use and benefit; and from and immediately after the decease of his said wife, upon trust to sell and transfer the said stocks, funds, and securities wherein or upon which the rest and residue of his said personal estate should be invested, and to receive and stand possessed of all the monies arising from the sale thereof, and all the dividends and interest which should have arisen from the decease of his said wife. upon the several trusts, and to pay and apply the same for the several legacies, uses, intents, and purposes thereinafter mentioned. And in particular, the testator thereby gave and bequeathed the sum of £6000, part of such lastmentioned monies, to his nephew the said Robert Primrose, to be paid to him as soon after his the said testator's wife's decease as conveniently might be, for his own absolute use. And the said testator thereby also bequeathed the sum of £5000, further part of such last-mentioned monies, unto the said Robert Livie the younger, to be paid to him over and above all other legacies given to him by

Morris

Morris v. Livie.

his said will, as soon as conveniently might be after his, the testator's, wife's decease, to and for his own absolute use. And after giving out of such last-mentioned monies the several other legacies therein particularly mentioned, as to all the rest and residue of the said stocks, funds, and securities wherein the residue of his estate and effects should be invested, and of all monies to arise by sale thereof, and all other his estate and effects, from and after the decease of his said wife, and payment and appropriation of the several sums of money and legacies thereinbefore given and bequeathed, the testator directed that his said trustees, and the survivor of them &c., should stand possessed thereof, in trust for such person and persons, and for such uses, intents, and purposes as his said wife, in and by her last will and testament, or any codicil thereto, should limit or appoint, give or bequeath the same; and in default of such limitation or appointment, gift, or bequest, and as to all such part thereof whereof no such limitation or appointment, gift, or bequest should be made, in trust for the executors and administrators of his said wife. And the testator appointed the said Jane Livie, Alexander Champion, and Robert Livie the younger, executrix and executors of his will.

By a codicil to his will, dated the 19th of February, 1807, after reciting the bequest of £4000 for the benefit of his sister Catherine Primrose, the testator declared his will to be, that in case the said sum of £4000 should be insufficient to purchase the sum of 6666l. 13s. 4d. Three per cent. Consolidated Bank Annuities, the deficiency should be made good out of his personal estate, and he therefore gave and bequeathed, in the event aforesaid, unto the said Alexander Champion and Robert Livie the younger, and the survivor of them, so much money, in addition to the said sum of £4000, as would with that sum purchase the sum of 6666l. 13s. 4d. Three per cent. Consols. And he declared that the trustees should stand possessed of the

said sum of 66661. 13s. 4d. Three per cent. Consols, upon the same trusts as were in his will mentioned and declared concerning the stocks and funds therein directed to be purchased with the said sum of £4000.

Morris v.

The testator died in May, 1807, and his will was proved in the same month by Champion and Robert Livie the younger. Champion afterwards dying, probate was in April, 1809, granted to Jane Livie.

In 1828, which was in the lifetime of his mother, Robert Primrose died, whereupon a bill was filed by his executors, Morris and Dawes, against Jane Livie, the assignees under the bankruptcy of Robert Livie the younger, and other persons, suggesting that after the death of Champion, Robert Livie the younger had committed a devastavit as to part of the testator's assets, and praying that the testator's residuary estate might be ascertained and secured; and if the same were found insufficient for payment of Robert Primrose's legacy of £6000, and the other legacies bequeathed out of the residue, then, that it might be declared that the legacy of £5000 bequeathed to Robert Livie the younger was liable to make good Robert Primrose's legacy, and the other legacies.

In this suit the Master reported, that on the 2nd June, 1807, part of the personal estate of the testator was invested by Alexander Champion and Robert Livie the younger, as the trustees and acting executors named in the will of the testator, in the purchase of 66661. 13s. 4d. Three per cent. Consols, to provide for the legacy in favour of the testator's sister Catherine Primrose, and that such stock was placed in the joint names of Alexander Champion and Robert Livie the younger, in the books of the Bank of England. That in or about the month of April, 1809, Alexander Champion died, whereby Robert Livie the younger became the survivor in the joint account of the said 66661. 13s. 4d. Three per cent. Consols, and also entitled to transfer the same; and that on or about the

Morris v. Livis. month of December, 1812, Robert Livie the younger sold and transferred the said sum of 6666l. 13s. 4d. Three per cent. Consols, and applied the proceeds thereof to his own use. The Master further found that Catherine Primrose received from Robert Livie the younger, from the death of the testator up to the month of December, 1821, the sum of £200 annually in respect of the interest or dividends of the monies by the testator's will and codicil directed to be invested for her benefit for her life, and that since the month of December, 1821, she had received no monies whatever in respect of such interest or dividends, but the same remained unpaid from that time.

It appeared that before he sold out the stock, Robert Livie the younger assigned his own legacy of £5000, for valuable consideration, to one Seward.

In January, 1830, the cause came on for hearing before the Master of the Rolls on further directions, when Catherine Primrose presented her petition for payment of the arrears of her dividends. That petition was dismissed, but with liberty to the petitioner to apply, as she might be advised, on the death of Jane Livie.

Early in 1833 Catherine Primrose died, having appointed the plaintiffs her executors.

In December, 1839, Jane Livie died, whereupon the suit was revived against her personal representatives.

The cause now came on again for hearing on further directions, and also on the petition of the executors of Catherine Primrose. The petition prayed that the sum of £2200, being the amount of the arrears of Catherine Primrose's annual dividends on the 66661. 13s. 4d. Consols might be paid to her executors out of the £5000 bequeathed to Robert Livie the younger.

Mr. Wigram and Mr. Goldsmid, for the executors of Robert Primrose.—In Skinner v. Sweet (a), the executrix

(a) 3 Madd. 244.

was indebted to the testator's estate, and had an annuity under the will, and the Vice-Chancellor decided that the annuity, as it became due, should be applied in discharge of the debt. Upon the same principle, the legacy of £5000 bequeathed to Robert Livie, junior, ought to be applied in satisfaction of the loss occasioned to the testator's estate by his devastavit. The circumstance of his having assigned his legacy before the devastavit was committed will make no difference: Hopkins v. Gowan (a). He had in his hands a certain fund, for which he was liable to account, and though he had a prospective claim to a reversionary legacy, yet it was subject to an account. [The Vice-Chancellor.—You say, that when he assigned the legacy he was under an obligation not to claim it till he had made good the consols.]

MORRIS T. LIVIE.

Mr. Russell and Mr. Colville, for the executors of Catherine Primrose.—Robert Livie, the younger, converted to his own use a fund which ought to have been provided for securing payment of Mrs. Primrose's dividends. He therefore cannot take any benefit under the will without explaining that particular fund. The rights of Mrs. Primrose must be dealt with in the same way as if the £6666 stock had not fallen into the residue. Whatever, therefore, may be the effect on the testator's general estate, the fund out of which she was entitled to receive payment being wasted, we submit that her estate has a prior claim to that of Robert Primrose against the £5000. If the Court, however, should not be of that opinion, the £5000 must be applied rateably, as far as it will go, in satisfaction of what is due to the estates of both legatees. The assignment by Robert Livie, junior, cannot affect the rights of these parties. The assignee, under the circumstances of this case, remains liable to the equities which attached to the assignor. Can he, by taking such an assignment as

MORRIS 6. LIVIE. this, without notice to the other parties interested under the will, deprive those other parties of the security which they had under the will?

Mr. Kenyon Parker and Mr. Stinton, for the representatives of Seward.—Neither Catherine nor Robert Primrose have any equity against Seward. In the case in Molloy a suit had been instituted when the assignment was made, which clearly distinguishes that case from the present. As to notice, the only party to whom notice could have been given was the assignor himself; the cestui que trust was not entitled to notice. Why, then, is Seward to be prejudiced by breach of trust committed subsequently to the assignment? At the time of the assignment, the £6666 was an appropriated fund, and not part of the residue.

Mr. Roupell and Mr. Cator, for the assignees under Robert Livie the younger's bankruptcy.

Mr. Swanston and Mr. Allfrey for the representatives of Mrs. Livie.—There was a strict appropriation of the £6666 Consols conformably with the directions in the will. The testator's estate was discharged as to that legacy the moment it was appropriated. If so, upon what principle is the loss to fall upon the residue, which it must do if the £5000 legacy is paid to the representatives of Catherine Primrose? By the terms of the codicil, the £6666 Consols are to be invested in the names of two only of the three executors. That was a trust entirely distinct from the executorship. Suppose it had been invested in other names, or in a different stock, could it have been contended that the loss of these dividends could have fallen on any other person than Catherine Primrose? If she has a right against the residue, she has an equal right against the tenant for life.

Mr. Grove, for some of the legatees under the will, contended that Mrs. Primrose was primarily bound to look to the preservation of the fund.

MORRIS V.

Mr. Wigram in reply.

THE VICE-CHANCELLOR.—The legacy of 6666l. 18s. 4d. Consols was a bequest prior and preferable to all the others now in question; those others, in effect, being merely residuary. The claimants under them, therefore, cannot be considered as entitled to any thing until after due provision made for the gift of consols.

It is contended, however, that this due provision was made, inasmuch as the requisite amount of that stock was appropriated in the names of the trustees appointed for that purpose by the testator, in the manner directed by him; and this may be true as to every person except one. That one is Mr. Robert Livie, the legatee of a part of the residue. As to him, it is, I think, not true; because, being by survivorship the sole trustee of the stock legacy. he wrongfully, and in breach of trust, sold out the stock, and applied the proceeds to his own use; an act which, as it disappointed and defeated the appropriation, and the testator's intention in respect to the stock legacy, must, as I conceive, preclude him, and those who may stand in his place, from contending that due provision was made for it. His subsequent conduct may, I think, as against him, be properly argued to shew that he never meant a fair or substantial appropriation; that the provision for the legacy was not made bond fide, and therefore was not made effectually.

I am of opinion, that, as to him, the primary obligation upon the estate (primary for this purpose) has not been discharged, and that, as far as his interest is concerned, there cannot be any residue until its discharge shall have taken place. March 15th.

MORRIS v. LIVIE. It is, however, insisted, that as he assigned his share of the residue for valuable consideration, after the stock had been placed and while it remained in its proper state of appropriation, before any breach of trust had been committed, the equity which might have existed against Mr. Livie, but for the assignment, cannot be made applicable against his assignee; that, as matters stood when the assignment was made, there was not, in fact, any equity attaching on what was assigned.

It appears to me, however, that I ought not to treat the cases as substantially different. The assignee had the will before him, and must be taken to have known the nature of the rights and interests under it. Supposing him to have ascertained, or been informed, that the appropriation had been made, he must still have been aware that it remained in Mr. Livie's power to disappoint and destroy that appropriation.

It may be argued that it was incumbent on the assignee, with a view to preserving his title from risk, to place the validity and effectual nature of the appropriation in a state free from uncertainty, by obtaining the consent of the persons interested in the stock legacy, or having it placed by some due course of proceeding in a position beyond the power of Mr. Livie. Mr. Livie, after his co-trustee's death, never could have said that there had been a fair and effectual appropriation without having the fund forthcoming. Can the assignment place the matter in a different position? If this particular form of reasoning with regard to the assignee should be considered unsatisfactory, I know not how he is to avoid being brought to the same conclusion in a way not substantially dissimilar. I conceive, be properly said, that Mr. R. Livie's legacy was given under a condition raised and implied by law, that undertaking he should duly fulfil the duties and obligations imposed on him by the instrument giving it. This he could not do without performing the trust as to the

stock legacy, which, before his own legacy became due, he had, by his own misconduct, disabled himself from performing. The condition, if existing, accompanied his legacy until its discharge, and applied to it as much after as before its assignment.

On the whole, having regard to what was done at the Rolls in 1830, the £5000 legacy must, I think, be apportioned rateably between the different interests which the breach of trust has disappointed.

DECLARE that the legacy of £5000 bequeathed to Robert Livie the younger, after the decease of Jane Livie, and interest thereon from the death of Jane Livie (after deducting legacy duty), are liable to be applied towards making good the loss sustained by Catherine Primrose, deceased, and also sustained by the estate of the testator by reason of the sale by the said R. Livie, the younger, of the 66661. 13s. 4d. Consols. Refer it back to the Master to ascertain what was the value of the said 6666L 13s. 4d. Consols on the 22nd December, 1839, the day of the death of the said Jane Livie, and of the dividends accrued due thereon since her decease. Take an account of what is due in respect of the said legacy of £5000, and interest thereon at £4 per cent, from the death of the said Jane Livie; and let the Master apportion the amount of what shall be found due in respect of the said legacy, and interest (after deducting legacy duty), between the executors of the said Catherine Primrose and the residuary estate of the said testator, in proportions conformable to the relative amounts of the sum of £2200 (the amount of the loss sustained by the said Catherine Primrose), and the sum which shall be found to have been the value of the said 66661. 13s. 4d. Consols on the said 22nd December, 1839, and the amount of the dividends accrued due since that time. And if the defendants, the executors of Jane Livie, shall desire it take an account of the dividends on the said 6666l. 13s. 4d. Consols which ought to have been received by the said Jane Livie, as tenant for life of the residuary estate of the said testator; and let what shall be so apportioned to the residuary estate of the said testator be again apportioned between the defendants, the executors of Jane Livie, and the capital of the residuary estate of the said testator in proportions, conformable to the relative amounts of the dividends of the said 6666l. 13s. 4d. Consols, which ought to have been received by the said Jane Livie, and the value of the said 6666l. 13s. 4d. Consols, when ascertained, as before-mentioned. Compute interest on legacies. Tax costs. Let the sums of &\_\_\_\_, and 2-Bank Annuities, standing to the credit of this cause, be sold. Out of the monies to arise from such sales, and any cash which may be standing to the credit of the said cause, let what shall be found due to the exMORRIS v. Livir.

1842. MORRIS LIVIE.

ecutors of Catherine Primrose on the first apportionment before directed be paid to such executors; and let what shall be found due to the executors of Jane Livie on the second apportionment before directed (if the same shall be made) be paid to such executors; and out of the residue of the monies to arise from such sales and cash let the costs before directed to be taxed be paid; and declare that the residue of the proceeds of such sales and cash (including what shall be apportioned to the testator's residuary estate) is applicable, in the first place, to the payment of the legacies and interest bequeathed by the said testator's will, other than the legacy bequeathed to the said R. Livie, the younger. Pay the said legacies and interest accordingly; and let the residue of the produce of the said sales and cash which shall remain after such payments (such residue to be verified by affidavit) be paid to the defendants, the executors of Jane Livie. Liberty to the several parties to apply.

## ISAAC SPOONER and RICHARD SPOONER, Plaintiffs: and

RICHARD SAMUEL BUTLER SANDILANDS. Defendant.

A.havingjoined IN and prior to April, 1816, the plaintiffs carried on the business of bankers at Worcester, in copartnership with Matthew Attwood and Thomas Carden, both deceased, under the firm of Attwood, Spooner, and Carden.

Previously to April, 1816, Thomas Jelf Sandilands had become indebted to the plaintiffs and their deceased partners in a sum of £2,500 upon a mortgage, and also in a rant of attorney large arrear of interest thereon.

At the time the mortgage was given, the premises comprised therein were subject to a prior mortgage, and, under a decree of this Court afterwards made in a suit for the ney authorizing foreclosure of such prior mortgage, the estates and pre-

rectory and glebe lands, of which A. was the incumbent, and of certain freehold lands and hereditaments of which he was seised in fee simple, and to hold such possession, and receive and take the tithes, fees, perquisites, emoluments, rents and profits thereof, until thereby and therewith, or otherwise, he should be paid the interest secured by the bond and warrant of attorney:— Held, that the letter of attorney operated not merely as a letter of attorney, but also as a charge on the freehold estates, and that C. was entitled to retain possession of the freehold estates until by means of the rents and profits all arrears of the interest should be satisfied, notwithstanding the death of A., and the revocation by that event of the power of attorney.

Feb. 23rd.

as a surety for B. in a bond to C. for securing the payment of the interest of a principal sum secured by a mortgage from B. to C., and having also ex-ecuted a waras a collateral security with the bond, afterwards executed to C. a letter of attor-C. to take possession of a

mises comprised therein were sold, and the proceeds of such sale were not sufficient to pay or satisfy any part of the aforesaid debt of £2,500.

SPOONER

S.
SANDILANDS.

In April, 1816, the plaintiffs and their late partners commenced an action at law against Thomas Jelf Sandilands, to recover the principal sum of £2,500, and the arrears of interest thereon, and proceeded to judgment, and sued out a writ of execution on such judgment. Thomas Jelf Sandilands thereupon applied to the plaintiffs and their late partners, and offered and agreed to procure further security for the payment of the interest which should from time to time become due and owing upon the principal sum of £2,500, and obtained their consent to stay the proceedings under the writ of execution; and the writ was thereupon withdrawn. Thomas Jelf Sandilands thereupon, and in pursuance of such agreement, with the Rev. Richard Sandilands, as his surety and at his request, executed to the plaintiffs and their late partners a bond dated the 25th April, 1816, whereby the said Thomas Jelf Sandilands and Richard Sandilands, and each of them, became bound to the plaintiffs and their late partners in the penal sum of £500.

The bond, after reciting the debt and the judgment, and the issuing of the writ of execution, and that for the better and more effectually securing the punctual and regular payment of the interest of the said sum of £2,500 by half-yearly payments, in the manner thereinafter expressed, the said Thomas Jelf Sandilands had applied to and requested the said Richard Sandilands to join him in the bond or obligation, with which request the said Richard Sandilands had consented and agreed to comply, contained a condition to the following effect, viz. "If the said Thomas Jelf Sandilands and Richard Sandilands, or either of them, their or either of their heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the said Matthias Attwood, Isaac Spooner, Richard Spooner, and

SPOONER S. SANDILANDS.

same, in the manner hereinafter mentioned: And whereas. in order the better to put and secure the said Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden in such possession, the said Richard Sandilands hath executed a warrant of attorney, bearing date the 14th day of May, 1818, thereby authorizing certain attornies therein named to enter up a judgment against him, the said Richard Sandilands, in the Court of King's Bench at Westminster, at the suit of the said Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden for the sum of 4991. 15s., and costs of suit; now, therefore, in consideration of the premises the said Richard Sandilands hath made, constituted, and appointed, and by these presents doth make, constitute, and appoint the said Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden, their executors, administrators, and assigns, the true, lawful, and irrevocable attornies of him the said Richard Sandilands, in his name, or otherwise, to take peaceable and quiet possession of the said rectory of Turnaston, and of the glebe land belonging thereto, and to receive and take all the tithes, fees, perquisites, and emoluments whatsoever of the said rectory, and the rents and profits of the said glebe land, and also to receive and take all the arrears now due and owing of such fees, perquisites, and emoluments, rents and profits; and also to take peaceable and quiet possession of the said lands, tenements, and hereditaments, situate in the said several parishes of Michael Church, Exley, and Crasswell, or places near thereto, in the said county of Hereford, and to receive and take the rents and profits thereof, and of every part thereof, and all the arrears now due and owing of such rents and profits; and upon receipt of such tithes, fees, perquisites, emoluments, rents, and profits, or any part or parts thereof, good and sufficient receipts, releases, and other discharges from time to time to make and give for the same, in the name of the said Richard Sandilands, his

heirs, executors, or administrators, or in the names of the said attornies or otherwise, as occasion shall require; and, upon any refusal, to give or deliver up such possession, or to pay such tithes, fees, perquisites, emoluments, rents, and profits, or any part thereof, in the name or names aforesaid, or otherwise to bring, commence, carry on, and prosecute, take, and exercise all such actions, suits, distresses, powers, remedies, ways, and means whatsoever, and in such manner as the said Matthias Attwood. Isaac Spooner, Richard Spooner, and Thomas Carden, their executors, administrators, or assigns, shall think proper, and one or more attorney or attornies, for the purposes aforesaid, or any of them, to substitute and appoint and at pleasure to revoke; and the said Richard Sandilands doth hereby give and grant to the said Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden, their executors, administrators, and assigns, and their attorney and attornies, to be substituted as aforesaid, full power and authority in and touching the premises, and doth hereby ratify and confirm, and promise and agree to ratify and confirm all and whatsoever they or any of them shall lawfully do or cause to be done in or about the premises, by virtue of these presents; and the said Richard Sandilands doth hereby declare, that the said Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden, their executors, administrators, and assigns, shall hold such possession of the lands, tenements, and hereditaments, and receive and take the tithes, fees, perquisites, emoluments, rents, and profits thereof, until thereby and therewith or otherwise, they, their executors, administrators, or assigns shall be fully paid and satisfied the said sum of 2411. 7s. 9d. due for the arrears of interest of the said sum of £2,500; and also all interest which now is due, or shall from time to time hereafter accrue and become due, and owing for or in respect of the said sum of 1,789l. 18s. 4d., the remain-

SPOONER

SANDILANDS.

SPOONER 5.
SANDILANDS.

ing part, at the times and in the manner in the said condition of the said bond mentioned."

At the time of the execution of the power of attorney, a Mr. Harris of Hereford was in possession of the rectory of Turnaston, and of the glebe land belonging thereto, and also in receipt of the tithes, fees, perquisites, and emoluments of the said rectory, and the rents and profits of the said glebe land; and he continued in possession thereof up to the year 1819, when the plaintiffs and their said late partners entered into possession thereof, and continued in possession of the same, and in the receipt of the rents, emoluments, and profits thereof up to the year 1834, when Richard Sandilands having gone abroad, the rents and profits of the said rectory of Turnaston were, by virtue of some ecclesiastical process or order of the Lord Bishop of Hereford, applied for the services and duties of the church.

At the time of the execution of the said power of attorney, Mr. Harris was also in possession of the freehold land and premises described in the power of attorney, and in the receipt of the rents and profits thereof, and the plaintiffs and their said late partners did not obtain possession of the same, and did not enter into the receipt of the rents and profits thereof until the year 1819, when they obtained possession thereof; and the plaintiffs, as the surviving partners of the said Matthias Attwood and Thomas Carden, continued in possession thereof down to and at the time of the filing of this bill.

Richard Sandilands died intestate as to the freehold land and premises, leaving the defendant his son and heir-at-law.

Soon after Richard Sandilands' death the defendant commenced an action of ejectment in the Court of Queen's Bench against the tenants occupying the said freehold lands and premises, in order to recover possession of the same, and declared in such action, and signed judgment against the casual ejector.

Upon such ejectment being commenced, and on the 21st June, 1841, the plaintiffs filed their bill against the defendants, stating the several facts, and stating that the tithes, profits, rents, and emoluments of the said rectory and glebe lands, and the arrears thereof, and the rents and profits of the freehold lands and hereditaments received by the plaintiffs and their late partners, amounted to 1,682l. 9s. 6d., which had not been sufficient to pay the said sum of 241l.7s. 9d., the said arrears of interest, and the interest accruing due on the said principal sum of 1,789l. 18s. 4d.; and that there was still a sum of 348l. 18s. 3d. arrears of interest on the last-mentioned sum due and owing to the plaintiffs.

SPOONER U. SANDILANDS.

The bill charged that the power of attorney was not revoked by the death of Richard Sandilands, and that the same was part of a security for a debt justly due to the plaintiffs. The bill further charged, that even if it were as a power of attorney revoked by the death of Richard Sandilands, yet that it operated not only as a power of attorney, but also as a contract and agreement in writing by Richard Sandilands with the plaintiffs and their late partners, that possession of the said freehold lands and premises should be retained by the plaintiffs and their late partners, and the rents and profits thereof be received by them, until they should be duly paid and satisfied the said sum of 2411.7s. 9d., the aforesaid arrears of interest, and also all interest which should from time to time become due and owing for or in respect of the said sum of 1,789l. 18s. 4d., or any part thereof, so long as the said sum of 1,789l. 18s. 4d., or any part thereof, should remain due. The bill further charged that the power of attorney was a valid equitable charge upon the said freehold lands and hereditaments, and constituted a good lien thereon, and entitled the plaintiffs to retain possession thereof.

The bill prayed an account of what was due to the plaintiffs for the said principal sum of 1,789l. 18s. 4d., and the

SPOONER

v.
SANDILANDS.

interest thereof, and for the said sum of 2411. 7s. 9d., the said arrears of interest of the said sum of £2,500, a declaration that the power of attorney was a valid and subsisting power, not revoked by the death of Richard Sandilands; or, if the Court should be of opinion that it was revoked, then a declaration that the power of attorney operated not only as a power of attorney, but also as a contract or agreement in writing by Richard Sandilands with the plaintiffs and their late partners, and that the plaintiffs might be considered to have a good equitable lien on the said freehold lands and hereditaments for the said sum of 2411.7s.9d., the aforesaid arrears of interest, and for all the interest then due and to become due on the said principal sum of 1,7891. 18s. 4d., or any part thereof, so long as the said sum of 1,789l. 18s. 4d., or any part thereof, should remain due, and that the defendants might be decreed to execute to the plaintiffs all such conveyances and assurances as might be necessary to secure to the plaintiffs the possession of the said powers, and to give them the benefit of the agreement.

The bill also prayed an injunction to restrain the plaintiffs from proceeding with the action of ejectment, and for taking any other proceedings at law against the plaintiffs.

The defendant, by his answer, admitted the statements in the bill, but contended that the power of attorney was revoked by the death of Richard Sandilands, and that it had no other operation or effect except as a power of attorney.

No evidence was entered into on either side.

Sir Charles Wetherell, Mr. James Russell, and Mr. Isaac Spooner, for the plaintiffs.

Mr. Cooper and Mr. R. D. Craig for the defendants.— The instrument in question is in form as well as substance a power of attorney, and is revoked by the death of Richard Sandlilands; and the only question is, whether it will bind the heir as a contract. In case of a bond or covenant, the heir is not bound unless specially named. [The Vice-Chancellor.—The singularity in the form of the instrument may possibly be accounted for, from its being apprehended that the validity of the security would be affected by any charge on the rectory.] That circumstance alone shews that the instrument was only intended to have effect during the life of Richard Sandilands. If it had been intended to affect the fee-simple estate, the parties would have taken a different course. As a letter of attorney it would have been revoked by the bankruptcy or insolvency of the party. A power of attorney, though coupled with an interest and in form irrevocable, is revoked by the death of the party making it. Watson v. King (a).

SPOONER 9.
SANDILANDS.

The power to give receipts in the name of the heirs of the party executing the power of attorney, does not render it the less revocable. The circumstance that no distinction is made between the rectory and the other property, affords strong evidence of the intention that there was not to be any distinction between them, and that as to both the power was to cease on the death of Richard Sandilands.

THE VICE-CHANCELLOR.—I am of opinion that the instrument in question amounts to a contract to charge the freehold hereditaments in question; under which the plaintiffs became entitled to enter into possession, and retain the possession, and receive the rents, until thereby or otherwise they should be paid the 1,789l. 18s. 4d., and interest, and the interest then remaining due in respect of the 2,500l. It is impossible to doubt that this was the intention of the parties, and I think that this intention has been carried into effect, and that, therefore, there must be the usual account as in a foreclosure suit, where

SPOONER v. SANDILANDS.

the mortgagee is in possession, of the principal money and interest due to the mortgagee, and of the amount due to him for costs, both here and at law; not directing, at present at least, either a sale or foreclosure. I will not grant any injunction, the defendant undertaking not to proceed at law. Further directions and costs must be reserved until after the Master shall have made his report (a).

THE decree declared, that the instrument dated the 13th day of June, 1818, amounted to an effectual contract, and that Matthias Attwood, Isaac Spooner, Richard Spooner, and Thomas Carden, therein named, became, and that the plaintiffs were entitled to hold possession of the lands, tenements and hereditaments in the pleadings mentioned, and to receive and take the rents and profits thereof, until thereby and therewith, and with the rectory and glebe lands, and the tithes, fees, perquisites, and emoluments in the said instrument mentioned, or otherwise, the plaintiffs, their executors, administrators and assigns, should be fully paid and satisfied the sum of 2411. 7s. 9d. due for the arrears of interest on the sum of 2,500L, and also all interest which had since accrued due, or which should from time to time thereafter accrue and become due, for or in respect of the sum of 1,789l. 18s. 4d., being the remaining part of the said sum of 2,500L, at the times and in manner stated in the condition of the bond in the pleadings mentioned, and the defendant by his counsel undertaking not to proceed with the action already commenced for recovering the possession of the said lands, tenements and hereditaments, or to commence any other proceedings at law to disturb the plaintiffs in their possession of the same; it was ordered, that it should be referred to the Master of the court in rotation, to take an account of what was due to the said plaintiffs for the said principal sum of 1,789l. 18s. 4d., and interest thereon, (distinguishing what was due for principal from what was due for interest), and for the said sum of 241% 7 9d., and to tax their costs of the suit, and at law; and it was ordered, that the said there should also take an account of the tithes, fees, perquisites, emoluments, rents and profits of the rectory, and of the glebe and other lands, tenements and hereditaments in the pleadings mentioned, come to the hands of the said Matthias Attwood and Thomas Carden in their lifetime, and also to the hands of the plaintiffs or any or either of them, or to the hands of any other person or persons by their or any or either of their order, or for their or either

(a) See Dale v. Smithwick, 2 Vern. 151; Lepard v. Vernon, 2 Ves. & B. 51; Mitchell v. Eades, Prec. in Ch. 125; Liebman v. Harcourt, 2 Meriv. 513; Watson v. King, 4 Campb. 272; Wallace v. Cook, 5 Esp. 117. of their use, or which without their or any or either of their wilful default might have been received, and what should be coming on the said account of rents and profits should be deducted from what should be found due to the said plaintiffs for the said sum of 2411. 7s. 9d. and interest and costs. The decree contained the usual directions for the production of books and papers, and the examination of parties.

1842. SPOONER . SANDILANDS.

## BARNES V. RACSTER.

THE original bill prayed a foreclosure of the estates The costs of mentioned in the pleadings. By a decretal order, dated the 26th July, 1833, and made by the Master of the Rolls on further directions in the original and revived suits, it priorities, alwas ordered that the mortgaged estates should be sold, and tates were by the purchase monies paid into Court: the sale to be free Court sold, and from the mortgage incumbrances, and the several mortgagees to have the same lien on the purchase monies that into Court, and they had on the estates, according to their priorities. And it was referred back to the Master to carry on the accounts, as directed by the decree in the cause, of what was due to the several mortgagees for principal and interest in respect of their securities, and to tax them their costs of these suits. And, after a direction for an account of rents and profits against the mortgagees in possession, further directions and costs were reserved.

By a subsequent order, dated in December, 1838, it was ordered that the Master, in proceeding to execute the former order, should have regard to the priorities of the several incumbrances; which priorities, by a report dated in July, 1832, had been found to be according to their dates.

By a report, made in pursuance of the last-mentioned order, the Master, after stating the sale of the estates and Court will not, payment of the money into Court, and the several sums

March 19th. 23rd. April 22nd.

several mortgagees held to be payable according to their though the esthe purchasemoney was paid formed one general fund.

A. having two estates, mort-gages to to B., then one to C., then both again to B. to secure both the original and a further advance, then both to D. The puisne incumbrancers have notice of the prior The charges. estates are not sufficient to pay all the mortgages, but one of the estates called No. 32 is sufficient to pay B. in full. The as between C. and D., marshal the securities by direct-

ing B. to take his full payment out of No. 32, so as to leave C. the first incumbrancer on the other estate, but B.'s debt must be thrown ratably on both estates.

2.1/20 910. 4. Have . 8 BARNES 6. RACSTER. due for principal and interest in respect of the several incumbrances, proceeded to tax all parties their costs, and he ascertained the proportions of the fund in Court which represented the estates comprised in each of the respective securities mentioned in the pleadings.

The cause now came on for further directions, with a view to a division of the fund in Court amongst the mortgagees. The fund, however, being inadequate to pay all parties their principal, interest, and costs, two material points became the subject of discussion.

The first question was, whether the incumbrancers were entitled to payment of their costs out of the fund before any division should take place, or whether the usual rule should be applied, viz. that each incumbrancer should add his costs to the principal and interest found due to him, and take the whole out of that part of the fund which represented the property included in his mortgage, according to his priority.

Mr. Swanston and Mr. Rasch, for certain puisne incumbrancers, contended that all the incumbrancers should be paid their costs out of the fund in the first instance, urging that the order of July, 1833, must have been made by consent, and that the arrangement had been entered into upon the principle of the fund being dealt with as one common fund. They cited Brace v. Duchess of Marlborough (a); Kenebel v. Scrafton (b); and Hunt v. Fownes (c): and expressed a doubt as to the correctness of the decision in Upperton v. Harrison (d).

Mr. Russell, for other incumbrancers, cited Wilson v. Metcalfe (e).

(a) Moseley, 50.

Cooke v. Brown, 4 Y. & C. 227.

(b) 13 Ves. 370. See White v. Bishop of Peterborough, Jac. 402; Wontner v. Wright, 2 Sim. 543;

(c) 9 Ves. 70. (d) 7 Sim. 444.

(e) 1 Russ. 530.

THE VICE-CHANCELLOR.—The general rule is, that the principal, interest and costs of a mortgagee go together. The circumstance of there being a decree for sale instead of foreclosure does not prima fucie change the rights of the parties. If a decree for sale is conceded upon terms, in order to prevent the operation of the general rule, the terms must appear. Here, the decree being to take an account of the principal and interest due on the mortgages, and, in the same sentence, to tax the costs of the mortgagees, the costs must be payable in the same priority as the principal and interest, there being no other terms or agreement in the cause.

BARNES
v.
RACSTER.

The other question in the cause related to the marshalling of securities under the following circumstances:—

Racster, being seised of Foxhall Coppice and a piece of land, marked in a plan of the estate No. 32, mortgaged in

1792, Foxhall to Barnes;

1795, Foxhall to Hartwright:

1800, Foxhall and No. 32 to Barnes;

1804, Foxhall and No. 32 to Williams.

The subsequent incumbrances were taken with notice of the prior incumbrances. The question was, whether as No. 32 was sufficient to pay the whole of Barnes's demand, Hartwright could, as against Williams, compel Barnes to resort to No. 32, thereby leaving Hartwright the first incumbrancer on Foxhall.

Mr. Wigram and Mr. Elderton for the plaintiffs, the representatives of Barnes.

Mr. Swanston and Mr. Rasch for the defendant Hart-wright.

Mr. Cooper and Mr. James Parker for the defendant Williams.

BARNES

BACSTER.

Mr. Kenyon Parker and Mr. Freeling, Mr. Russell and Mr. Hislop Clarke, for other defendants.

The case was twice argued. At the conclusion of the first argument, the *Vice-Chancellor* expressed his opinion, shortly, to the effect, that Hartwright had no claim against No. 32 by virtue of any contract, that he could not have filed his bill to redeem No. 32, and that the equity which he claimed, whether enforceable or not against the mortgagor, or his heir, could not be enforced in such a case as the present, to the prejudice of Williams. His Honor, however, considering the question to be one of some nicety, directed the case to stand over for further argument. And now—

Mr. Cooper and Mr. James Parker argued on behalf of the defendant Williams.—If the question were between the plaintiffs and Hartwright, and the devisee of the mortgagor, the general rule as to marshalling would apply. But it will not apply as between first and second mortgagees and a third incumbrancer. There is no instance in which the rule has been applied to the prejudice of a creditor. It was established for the benefit of creditors, and to the prejudice of no one but volunteers. The principle is clearly laid down by Lord Eldon in Aldrich v. Cooper (a), and it flows from this principle that it is not in the power of the plaintiffs to make such an election of their securities as shall benefit the second incumbrancer and disappoint the third. There is no instance in the Roman law of the doctrine being applied to the prejudice of any other persons than the representatives of the debtor (b).

In the ordinary case of a mortgage of two properties to one party, and the mortgage of one to another, the Court

<sup>(</sup>a) 8 Ves. 382; see p. 389.

<sup>(</sup>b) See Story, Eq. Jur. Ch. xiii.

gives the mortgagee of the two a right to foreclose both; and, as a consequence, the party who has a mortgage of one has a right to redeem the first. But even in that case the right to redeem does not universally prevail; for if there be a mortgage of estates A. and B., then a mortgage of A., and then a mortgage or sale of B. to another party. there is no case in which the Court (apart from fraud) has done otherwise than apportion the first charge between the two estates: there is no case in which it has marshalled the properties between the two first incumbrancers. observations of Sir Edward Sugden in Averall v. Wade (a), are illustrative of this. After observing that, where one creditor has a demand against two estates, and another a demand against one only, the latter is entitled to throw the former on the fund that is not common to them both. he says:--"This is a narrow doctrine, and cannot generally be enforced against an incumbrancer who is a mortgagee." He also in the same case (b) adopts Lord Eldon's guarded expressions as to third persons (c). And in his treatise of "Vendors and Purchasers," referring to the same doctrine, he says—"This does not touch the question between innocent purchasers (d)." This view of the case is perfectly consistent with the general proposition laid down by Lord Hardwicke in Lanoy v. Dutchess of Athol (e), which does not apply to third incumbrancers for value. As against an incumbrancer for value, the only rule is that equality is equity.

In cases between principal and surety, if contemporaneously with the contract of suretyship a mortgage security is given, the surety paying the debt may stand in the place of the creditor in respect of the mortgage. But that rule does not apply where a second mortgage security is given: BARNES b. RACSTER.

<sup>(</sup>a) Lloyd & G. t. Sugd. 252.

<sup>(</sup>b) Id. 258.

<sup>(</sup>c) 8 Ves. 391.

<sup>(</sup>d) Vol. 3, p. 436.

<sup>(</sup>e) 2 Atk. 446. Suppose a person who has two real estates, &c.

BARNES V. RAGSTER. Copis v. Middleton (a); Wade v. Coope (b). [In the course of the argument the Vice-Chancellor referred to Tunstall v. Trappes (c), and Gwynne v. Edwards (d).]

Mr. Swanston and Mr. Rasch for the defendant Hartwright.—Is there a right of marshalling in a second mortgagee against a first mortgagee; if there is, did it exist in this case, and if so, when? We submit that, in 1800, circumstances existed to which the rule of marshalling applies. There were then two creditors, one having a single fund, the other having two funds. What is the nature of the right of marshalling? It is this—that the single fund shall be protected from the demands of the creditor who has two-protected in one of two ways, either by preventing any assault on the fund, or, if assaulted, by applying the principle of compensation and indemnity by means of the other fund. Marshalling is not founded on contract, but on equitable lien. Here the lien had arisen and existed in 1800: how then can any subsequent dealing between the mortgagor and third persons deprive the second mortgagee of that lien? The equity of the second mortgagee is, that equal claims must prevail by priority. It cannot be contended, that, because his right might under some circumstances be defeated, as by tacking, therefore it does not exist. Besides, we have an equity beyond a mere right of marshalling, arising from the first mortgagee having notice of our right. Independently of that, however, it is submitted that the general rule must prevail, and the intervention of a third creditor will make no difference: Ex parte Kendal (e); Shalcross v. Dixon (f); Aldridge v. Forbes (g). The equity which Hartright had originally.

<sup>(</sup>a) T. & R. 224. See 1 C. P. Coop. 625.

<sup>(</sup>b) 2 Sim. 155.

<sup>(</sup>c) 3 Sim. 286.

<sup>(</sup>d) 2 Russ. 289, n.

<sup>(</sup>e) 17 Ves. 520.

<sup>(</sup>f) Jarm. Conv. (ed. Sweet),

Vol. 5, p. 493.

<sup>(</sup>g) 4 Jurist, 20.

and which we submit has not been taken away from him, binds the land into whatever hands it comes. In Hartley v. O'Flaherty (a), Lord Plunkett says—" If a mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable in the first instance to the discharge of the mortgage, and in ease of the bond fide purchaser; and it is contrary to every principle of justice to say, that a person afterwards purchasing from that mortgagor shall be in a better situation than the mortgagor himself in respect of any of his rights." The case of Averall v. Wade was decided much more with reference to the particular security than the general principle.—The following cases were also mentioned in argument: Lord Pomfret v. Lord Windsor (b); Gregg v. Arrott (c); and as to principal and surety, Wright v. Morley (d); Dering v. Lord Winchelsea (e); Mayhew v. Crickett (f).

1842. BARNES RACSTEE.

THE VICE-CHANCELLOR.—Racster having two estates, April 22nd. one called Foxhall, and another which has been called No. 32, mortgages Foxhall alone to Barnes in 1792, and afterwards, by way of second charge, mortgages Foxhall (alone), in 1795, to Hartwright, who at the time has notice of Barnes's security. Subsequently, in 1800, Racster mortgages both No. 32 and Foxball to Barnes to secure a further advance, and in such a manner as to make No. 32 and Foxhall liable each to the whole of Barnes's two advances, Barnes at the time having notice of Hartwright's security. After this both No. 82 and Foxhall are mortgaged by Racster, in 1804, to Williams, who at the time has notice of the former securities.

The present proceedings were commenced subsequently to the year 1804, nor until after that year was any step

- (a) Lloyd & G. t. Plunk. 216.
- (d) 11 Ves. 12.
- (b) 2 Vez. sen. 485.
- (e) 1 Cox, 318.
- (c) Lloyd & G. t. Sugd. 246.
- (f) 2 Swanst, 185.

BARNES v. RACSTER. taken by any party for enforcing either of the securities, or obtaining payment. All the mortgages cannot be paid Foxhall alone is not sufficient to pay the first charge upon it, but No. 32, without Foxhall, is sufficient to pay the whole of Barnes's demands. Hartwright, therefore, claims to throw Barnes on No. 32 exclusively. this Barnes is indifferent; but Williams objects, contending that as he is an incumbrancer for value, the burthen of the first mortgage ought to be borne at least ratably by Foxhall and No. 32, upon which latter Hartwright never took a charge. This is the question to be decided, and I think that it may be decided without necessarily involving either of two other points to which the argument has extended itself. I mean, first, the question what would have been the rights of Hartwright and Williams had Barnes's security upon No. 32 preceded and not been subsequent to Hartwright's security on Foxhall; and, secondly, the question, what would have been the rights of the parties had Williams's security not existed at all, or not existed until after the commencement of these proceedings. Upon each of these two points I entirely reserve myself.

As to the matter to be determined, the first observation to be made is, that, considered without any reference to Hartwright or to Williams, the nature and effect of the security of 1800 were, as I conceive, to make No. 32 and Foxhall pari passu, and ratably, according to their values, liable to Barnes's two charges. That, I think, would have been the result between the different heirs of Racster, had he died intestate and insolvent as to his personal estate, leaving one person his heir as to No. 32, and another person his heir as to Foxhall. At least the heir of Foxhall could not have claimed more against the heir of No. 32.

Taking this to be so, I am unable to see that Hartwright had in or before the year 1804 (when Williams took his security) acquired any right in No. 32, or any equity against Racster to preclude him from dealing with it on that footing for any purpose that his necessities might require. Contract certainly, as to No. 32, Hartwright had none. It was as to him an accident-a matter with which he had neither privity nor concern, that Racster happened in 1800 to mortgage No. 32 to Barnes. Could not Barnes and Racster at any time after 1800, as against Hartwright, have sold or mortgaged No. 32 separately to a stranger, though with notice, leaving Foxhall charged as if it was in 1795, and leaving Hartwright in the same situation as if the security of 1800 had never existed? Barnes and Racster could have done this as against Hartwright, why should not Racster be able as against Hartwright to do so? In my opinion, it would be more than justice to him, and less than justice to Racster, to hold that the security of 1800 rendered No. 32 to any degree. or in any respect, less available for the necessities of Racster than the rights of Barnes required. I think that Hartwright had not any equity to prevent Racster from doing what he did, namely, carrying this estate to market, and selling or pledging it as charged only according to the tenor of the security of 1800, that is, ratably and pari passu with Foxhall.

Again, suppose judgments to have been recovered by strangers in 1794, 1799, and 1801, against Racster, who was, I believe, previously to 1800, seised equitably and not otherwise of No. 32. Suppose the security of 1800 good against all these judgments; what would have been the relative rights of Hartwright and the several judgment creditors (with or without elegits) as to No. 32? Can Williams be in a worse situation than that in which he would have stood if his security had consisted of a judgment only instead of what it did? If it were conceded in the present case, that had Williams's charge not existed, the right claimed by Hartwright could now be enforced against Racster, it does not in my judgment follow that in

BARNES v.
RACSTER.

BARNES v. RACSTER.

1804 (in the absence at the time of any suit or proceeding for applying the property in question, or otherwise relating to it) any such right had arisen. The position of Williams, who took his security with notice, has been in argument assimilated to that of the heir of Racster, or of a person claiming merely as a volunteer under him. To this comparison I am not prepared to agree. To render it just, it ought to be established either that eo instanti when Barnes took his second security, Hartwright acquired a lien on No. 32, or that it was inequitable in Racster, however much in need of money, and however fair his intentions, to use No. 32 as part of his property, unless by the consent of Hartwright, or on the condition of paying him his whole I am of opinion that neither proposition can be established, and that Hartwright's title, if any, against No. 32, does not extend beyond such interest in it, as before the institution of these proceedings Racster did not alienate for value; holding, as I do, the notice to be as immaterial as notice to a purchaser of a judgment recovered against a vendor, when the latter having a power, and being seised in fee subject to the power, can make a title and alienate the fee by an exercise of that power, destroying the creditor's security.

Upon the whole, I retain the opinion which on a former occasion I expressed, that circumstanced as the present case is, Hartwright and Williams stand with regard to the matter in dispute on an equal footing; that Barnes must be paid out of the respective proceeds of No. 32 and Foxhall, pari passu, and ratably according to their amounts; that the residue of the produce of Foxhall must be applied towards paying Hartwright; and that the residue of the produce of No. 32 must be applied towards paying Williams;—a conclusion, as I consider, entirely in accordance with the principles on which Lanoy v. Dutchess of Athol, Aldrich v. Cooper, and Averall v. Wade were decided.

1842. March 17th.

## ATTORNEY-GENERAL v. CULLUM.

THIS cause came on for hearing on further directions and on the petition of the relators. The charity in question, called "The Guildhall Feoffment of Bury St. Edmunds," was established in the reign of Edward IV., by the feoffments and will of John or Jenkin Smith, under which divers lands near Bury St. Edmunds were conveyed to the following uses: viz. first, to the praise, honour, and glory of God, and of the most gracious virgin, and of the glorious martyr and king St. Edmund, and in the relief of the aldermen and burgesses, and the whole community and poor inhabitants of the town of Bury St. Edmunds, in support of the burthens daily falling upon them." The estate of the feoffees was afterwards increased by gifts, devises, and bequests, by many benefactors in succession for a long series of years. The objects of the benefactions were various: namely, for supplying wool to set the poor on work, for binding out apprentices, for the repairs of churches, for the prisoners in gaol, for godly purposes, for cakes and wine at the annual meeting of the feoffees and other works of charity, for catechising and instructing poor people, for the ministers for their pains in so doing, for sick lepers, for food and raiment for aged and impotent people, for alms, for payment of taxes and tollages, for bread for the poor, for horn-books and primers for the poor children, for a house for the justices and otherwise for the public good, for the setting forth of soldiers serving in the town, for the support of priests who should pray for the souls of the donors. &c.

The annual income arising from these gifts amounted to about £1156; in addition to which the annual sum of about

24th. Where a charity had been instituted for the common benefit of a parish, and the parishioners, on an information filed for the regulation of the charity, agreed that education should form part of the scheme; the Court, although the parishioners were of various religious denominations, refused to sanction a system of education, in which it was proposed that particular se-lections from the Scriptures should be read. and the schools should be closed on Sundays, and in which no special provision was made for the religious creed of the schoolmaster.

Courts of equity in this country will not sanction any system of education in which religion is not included, and where education is to be provided for Christians of different denominations, there, by rea-

son of the necessity of teaching religion according to particular tenets, and the difficulty of teaching different persons according to different tenets, instruction according to the doctrines of the Church of England must prevail; but provision will be made, as far as possible, for the exercise of conscientious scruples on the part of Dissenters.

AHlyen v Bishot of 11.

Ph 56

ATT.-GEN.
v.
Cullum.

£954 was received by the feoffees from lands purchased by the sale of church plate, making the whole annual income about £2110.

It appeared that the sale of the church plate took place on the dissolution of the monastery of Bury St. Edmunds. The poorer order of the population being by that event left destitute, the parishioners of the two parishes of St. Mary and St. James, in Bury, agreed, in order to provide a fund, to sell the church plate, and after repairing the church to employ the surplus in support of the poor.

In 1809, a decretal order was made in a suit instituted by the attorney-general, at the relation of Waller Wright, against the then trustees of the charity, by which it was ordered that new trustees should be appointed and a proper conveyance made to them. Under this order a deed, dated the 28th December, 1810, was prepared by Master Cox, and duly executed, by which it was witnessed, that, for the performance of the trusts and to the intent that the pious memories of the worthy benefactors, donors, and founders of the charities for which the lands and tenements thereinafter given might be continued and perpetuated according to the true intentions of the said donors and benefactors in their respective wills and grants, manifested according to the schedule to the indenture annexed, all those freehold messuages, lands, and tenements, (which were specified), were bargained and sold to the new trustees and their heirs to the intent, not only that the pious memories, &c., might be published and recommended to posterity, but also that the messuages, &c., might for ever thereafter be continued and employed according to the true intention of the said donors, founders, and benefactors, and also upon trust and confidence that the new trustees would from time to time, and at all times thereafter, make use of the rents, issues, increase and produce of the said messuages, tenements, and premises, for the common profit and benefit of the inhabitants of Bury St. Edmunds, in such manner and

wise and for such charitable uses, intents, and purposes, as were in the schedule thereunto annexed, or any other uses intended by the donors, although the same were not contained in the schedule. Then followed a schedule containing a list of charitable dispositions, which were generally speaking of the same nature as those which have been mentioned, except that such as were purely of a Roman Catholic nature were omitted.

The charities mentioned in the schedule being considered as in many respects not well adapted to the habits and requirements of modern times, and the charity in other particulars requiring revision, the present information was filed at the relation of Francis King Eagle and James Cobbing; and in 1836 a decree was made, by which it was referred to the Master to ascertain the amount of the property of the charity, and to settle a scheme.

The Master accordingly set forth a scheme, by which, after making provision for increasing the charities to the poor not receiving parochial relief, and for an augmentation of the allowance to the parochial clergy, and for the introduction of some new charities,—as an annual gift to the hospital, and a gift of £300 to a new church,—he proposed that the balance of the funds in hand should be appropriated to the foundation and establishment of three schools, to be open to the children of parents of all religious denominations, and to be called, "The Guildhall Commercial School," "The Guildhall School for poor Girls," and "The Guildhall School for poor Boys;" and amongst other rules and regulations for these schools, he proposed the following: viz. that the school should be closed, as regarded instruction, on Sundays; that a convenient and sufficient portion of the stated school-hours should be set apart daily for reading the Scripture lessons prepared for the use of the Irish national schools, and the authorized version of the Scriptures, or such part thereof as the trustees should think proper; and that no other re1842. ATT.-GEN. CULLUM. 1842. Att.-Gen. Cullum. ligious instruction should be introduced into the school. No mention was made as to the religious creed of the masters or mistresses of the schools; but the power of appointment and removal of the master and mistresses was vested in the trustees.

To this part of the Master's scheme the defendants, the trustees, objected; and they proposed that the masters and mistresses of the respective schools should be members of the Established Church; that during one hour, at least, in every school-day, the masters and mistresses respectively should give general religious and moral instruction to all the scholars, in such books as the governors should select; that on every Lord's-day they should give instruction, in the doctrines of the Church of England, to such of the children whose parents were willing and did not object to their receiving such instruction; that the scholars should be required to repair once every Lord's day to the parish church, or other place of worship, according to their several creeds; and that those who should attend the parish church should go along with and be accompanied by the masters and mistresses respectively.

Mr. Cooper and Mr. M'Christie, for the relators, suggested that the charity was intended for the general benefit of all the inhabitants of Bury, and that it was so considered by the Master who prepared the deed of 1810; but that the effect of the defendants' proposal would be to limit the benefits of the charity to persons of the Church of England.

Mr. Twiss and Mr. Wray, for the Attorney-General, contended that the law of this country, though it tolerated all religions, did not place the religion of Dissenters on an equal footing with that of the Church of England; and that if education was provided for, it must be a religious education; and if a religious education, it must be according to the principles of the Church of England.

Mr. Boteler and Mr. Lovat, Mr. Russell and Mr. Bacon, appeared for other parties.

ATT.-GEN.
CULLUM.

In the course of the argument, the Vice-Chancellor said that it might be a question whether or not any part of the funds ought to be devoted to the purposes of education at all; but that if any part were so applied, religion must be considered; for that any scheme of education without religion would be worse than a mockery. The difficulty here was, how to provide for education in a proper manner, with a view to the opinions and feelings of persons of various religious creeds. His Honor did not for a moment question the equal right of every Roman Catholic and every Protestant dissenter in the town of Bury to a participation of all the advantages of the charity; but as religious instruction could not be provided for every class of persons holding different religious opinions, he thought that, if called upon to decide the question, he had no alternative but to direct that the master and mistress of each school should be of the Established Church.

THE VICE-CHANCELLOR.—As the term education is properly understood, by all the parties, to comprehend religious instruction, that religious instruction is an essential point to be considered. In my judgment this scheme does not provide for religious instruction in the sense in which the expression ought to be understood. Its effect is not that it does not provide for religious instruction according to the doctrines of the Church of England, but that it does not provide for what I am able to consider religious instruction at all. If education, of course including religious instruction, is to be provided for, I apprehend it must be according to the doctrines and principles of the English Church. I know no other standard or guide to which the Court can resort; and dissenting as I do from the present scheme, as far as it relates to purposes of edu-

ATT.-GEN.

CULLUM.

cation, I must send that part of the scheme back to the Master for the purpose of review, unless some other course can hereafter be suggested to the Court. If education is to be part of the scheme, it is clear, in my judgment, that whatever may be the particular course of instruction pursued, or whatever may be the course as to exemption, if any, from any particular points of instruction, the masters, mistresses, and teachers must be members of the Church of England. I do not think it necessary to declare that either the masters or teachers should be clergymen, but that the masters, mistresses, and teachers. should all be members of the Church of England, and that no other course of religious instruction should be adopted than such as is in conformity with the Church of England. I make these observations upon the hypothesis that it will ultimately be thought right that a provision for education should form a part of this scheme—a matter upon which I do not mean to bind myself by any opinion, and which, perhaps, may require reconsideration. Therefore, in sending this case back to the Master. I mean to refer it to him to consider whether, having regard to the nature of the charities, and the present state and condition of the town of Bury, it is fit and proper that any provision should be made for education; and if the Master should be of opinion in the affirmative, then to declare that there is to be no master, mistress, or teacher, who is not a member of the Church of England, and that no other course of religious instruction shall be adopted than in conformity with that Church.

March 24th.

On this day Mr. Cooper informed the Court, that all parties had agreed to modify the scheme as to education as follows:—That the masters and mistresses of the schools should be members of the Church of England; that, during one hour at least of each school-day, the master should give religious instruction to all the scholars,

such religious instruction to be confined to the reading and explanation of the Scriptures; that on every Lord's-day he should give instruction in the liturgy, catechism, and articles of the Church of England, to such of the boys whose parents were in communion with that Church; and that all the scholars should be required to repair twice every Lord's-day to church: provided, however, that any two of the trustees, by a note in writing, might excuse from attendance at church any of the scholars who were children of persons not in communion with the Church of England.

1842. ATT. GEN. Ð. CULLUM.

THE VICE-CHANCELLOR said, that if the parties had no objection to this arrangement, he had none; but he wished to have it distinctly understood that the ground on which he had proceeded on the former occasion was not a preference of one form of religion to another, but the absolute necessity of adopting the course which he had suggested.

## ATTORNEY-GENERAL v. COMPTON.

THE affairs of the parish of Marylebone, more especially An information as relates to the relief and maintenance of the poor, are regulated by various local acts of Parliament, by one of which, the 35 Geo. 3, c. 73, it was enacted, that all gifts, donations, benefactions, and sums of money whatsoever, the relief of the then payable, or which should thereafter become payable, for and to the use of the poor of the parish of St. Marylebone, not being directed to be applied for private or partition of any part cular charities, and not being sacramental money, should for the relief of from time to time be paid into the hands of the treasurer or treasurers for the use of the poor of the said parish, to

March 2nd.

lies to compel the restitution of money improperly applied out of funds raised for poor by means of rates and assessments.

The applicaof a fund raised the poor to the payment of the bill of costs of an action brought against

an officer of the guardians of the poor, for a libel upon him in respect of acts done by him in the execution of his duties, is a breach of trust on the part of the holder of that fund.

107w. 1 2 Fall. O 2 Oh. : 1842. ATT.-GEN. v. Compton. be applied in aid of the rate for the relief of the poor thereof. And it was further enacted, that the directors and guardians of the poor should, and they were thereby authorized and empowered, to maintain and employ, in any works, trades, manufactures, and employments whatsoever, the poor maintained in any workhouse made use of for the purposes of the act, and might provide a convenient stock of flax, hemp, wool, cotton, thread, iron, stone, wood, leather, or other materials for the employment of the poor received into such house; and, for that purpose only, might set up, use, and occupy any trade, mystery, or occupation whatsoever in such house; and might sell, vend, and dispose of such goods, wares, and merchandizes as should be manufactured or made by such poor in such workhouse; any statute, law, or usage to the contrary notwithstanding. And it was further enacted, that all monies arising from any work or labour done by the poor in any workhouse or other houses made use of for the purposes of the act, should go in aid of the poor's rate, and other monies raised for carrying into execution that and the therein-recited acts.

Sometime before the year 1837, the parish adopted the provisions of the stat. 1 & 2 Will. 4, c. 60, for regulating vestries.

Since the passing of the stat. 35 Geo. 3, c. 73, to the present time, the vestrymen of the parish, acting under the powers given to them by that and other acts, have made rates and assessments on the inhabitants of the parish for the maintenance of the poor, and for the other expenses mentioned in the acts, and have paid to the directors and guardians of the poor of the parish, or to their treasurer, out of such rates and assessments, such sums of money as have been necessary to enable the directors and guardians to maintain the poor of the parish.

In 1837, differences arose between Dr. Glendinning, the honorary physician of the parish infirmary, and Dr. Firth, the house-surgeon of the workhouse and infirmary, relative to the death of a female pauper, for whom Dr. Firth had improperly, as alleged by Dr. Glendinning, prescribed doses of opium. These differences led to the dismissal of Dr. Firth, and to actions of libel and slander by Dr. Firth against Dr. Glendinning, and Dr. Boyd, the assistant-surgeon of the workhouse. In December, 1837, which was before the trial of these actions, application for protection was made on behalf of Doctors Glendinning and Boyd to the then directors and guardians. This application, however, was refused on the ground, as stated in the minute, that the directors and guardians, though at all times anxious to protect their officers in the performance of their duty, could not in the then stage of the proceedings legally undertake the defence of the applicants.

ATT.-GEN.

In February, 1839, the action against Doctor Glendinning came on for trial, when the jury, after a charge from the judge very favourable to the defendant, found a verdict for him on his plea of the general issue, but against him on his plea of justification, he having entered into no evidence. The plaintiff then declined proceeding in his action against Dr. Boyd. In these actions Doctors Glendinning and Boyd employed as their attornies Messrs. Hill and Randall, who were the attornies and solicitors of the directors and guardians. Their taxed bill of costs against Dr. Glendinning amounted to 2911. 19s. 8d., and that against Dr. Boyd to 54l. 17s.

Immediately after the termination of the trial Dr. Firth, who had previously taken the benefit of the Insolvent Act, disappeared.

In March, 1839, an election took place of directors and guardians for the year ensuing. Availing themselves of this change, Drs. Glendinning and Boyd, in September of the same year, applied to the then directors and guardians for payment of the costs which had been incurred by them;

ATT.-GEN.

COMPTON.

and at a board held on the 1st November following, their claims, after a discussion and division, were allowed; and such allowance was recorded in a minute of the proceedings. That minute was afterwards, at a board of directors and guardians held on the 8th November, confirmed by a majority of twelve to eight, notwithstanding the presentment of a memorial against this proceeding by eighty-five rated inhabitants of the parish. In pursuance of this minute a resolution was passed, which at a subsequent meeting was confirmed by the same persons who constituted the former majority, and notwithstanding a written protest by six rated inhabitants, that cheques should be drawn for and applied in discharge of the amount of costs. Two cheques were accordingly drawn in the usual form on Sir Claude Scott & Co., the bankers of the treasurer of the directors and guardians, for the respective amounts of 2911. 19s. 8d. and 54l. 17s., and were made payable to Hill and Randall; and such cheques were on the 28th February, 1840, delivered to Randall, as the surviving partner of Hill, and he received the amount from Sir Claude Scott & Co., out of monies of the directors and guardians in their hands.

At the time this payment was made, the balance of cash in the bankers' hands belonging to the directors and guardians consisted principally, if not wholly, of sums raised by the rate for the relief of the poor, (in respect of which the directors and guardians, between the 1st of January and the 30th June, 1840, received from the vestry-men upwards of £14,000); of sums arising from the labour of paupers under the before-mentioned statute of 35 Geo. 3, c. 73; of sums repaid after having been advanced out of the poor's rates, under the stat. 14 Geo. 3, c. 78, for fire rewards; and of sums repaid which had been advanced out of the poor's rates in cases of bastardy.

The information was filed in December, 1840, at the

relation of Jacob Metcalfe and William Green, two rated inhabitants of the parish, against John Compton and others, being the twelve directors and guardians who had formed the majority of the board at the meeting of the 8th November, 1839, and at the following meeting, and against Randall. It stated many of the foregoing facts, and set forth certain notices which had been served upon the twelve first-named defendants, calling upon them to refund the monies so paid to Randall, and also notices upon the auditors, calling upon them not to allow in their accounts the monies so paid. It also averred, that when Randall received the cheques he well knew that they would be paid out of monies arising from the rates and assessments for the maintenance of the poor, and that such monies had been paid by the vestrymen to the directors and guardians for the relief of the poor; that the monies so received by the defendant Randall, in payment of the cheques, were monies held by the directors and guardians of the poor upon trust for charitable purposes, that is to say, for the maintenance and relief of the poor, and were impressed with the character of charity, or at any rate the same were trust monies and held upon trusts, and the defendant Randall therefore became responsible for the same, and trustee thereof for charitable purposes, or for the same trusts, and liable to return the same to the treasurer in order to be applied to the trusts upon which they were held prior to such payment to Randall. The information further alleged that the payments so made to Randall were and are wrongs and grievances to all the rated inhabitants of the parish, including the relators.

The information prayed that the twelve first-named defendants might be declared guilty of a breach of trust in ordering payment of the sums of 219l. 19s. 8d. and 54l. 17s. to Randall, and that it might be declared that Randall was a party to that breach of trust, and that the sums in question were raised for, and applicable to, charitable pur-

ATT.-GEN.

COMPTON.

ATT.-GEN.

COMPTON.

poses, or at least were trust monies; and that all the defendants might be decreed to repay and make good such sums with interest at £5 per cent., from the 28th of February, 1840, and also pay the costs of the suit.

The defendants, the directors and guardians, by their answer, stated that the payment in question had been made with the sanction of the vestry, and by the auditors, and they submitted that they were not personally responsible, and ought not to have been made parties to the suit.

The defendant Randall, by his answer, insisted on the legality of the payment, upon the ground that the money in the hands of the directors and guardians was applicable, not only to the maintenance of the poor of the parish, but to the general purposes of expenditure incident to a workhouse.

The cause now came on for hearing.

Mr. Russell and Mr. Chandless, for the relators, commented on the great danger which would ensue if persons in the situation of Doctors Glendinning and Boyd were permitted to be indemnified out of public monies. However unjust the actions might be, and although they might have been brought against those gentlemen in reference to the management of the poor, yet that did not warrant their receiving their costs out of the poor's rates.—In support of the jurisdiction of the Court, the counsel for the relators cited Attorney-General v. Brown (a); Attorney-General v. Corporation of Poole (b).

Mr. Koe and Mr. Moore, for the defendants, the directors and guardians.—The parish of Marylebone having adopted the stat. 1 & 2 Will. 4, c. 60, the relators are bound by the provisions of that act. By the 37th section of that act, no-

thing therein contained relating to the appointment and duty of auditors shall debar the parishioners from any remedy by them before possessed by the law of the land. Now, it is not alleged that all the accounts of disbursements by the board of guardians were not accurately kept, or that any person had not full information of the manner in which the money was disbursed. If the relators had had any ground of complaint against the rate, or the disposal of it, they might have appealed to the sessions, or proceeded against the guardians by indictment. Instead of that, they stand by and permit what they term a misapplication of the money, and afterwards apply to this Court. A memorial by 85 out of 22,000 rated parishioners is unimportant. The relators do not state that they were not aware of every proceeding taken by the board of guardians and the vestry board. After this long delay on the part of the relators, they are bound by the auditors' allowance of these accounts. If the relief sought by the relators is granted, the benefit will be received, not by the ratepayers, from whom the money was taken, but by the present rate-payers; a result which will be productive of equal injustice, at least, with that which is insisted upon.

But, in truth, the guardians and directors were fully justified, on the termination of the action, in paying these costs. While the action was proceeding, it was impossible to say what evidence might be produced by the plaintiff at law; but, after its termination in a manner most favourable to the defendant at law, can it be said that the defendants were not fully justified in what they did? An officer appointed by them had, in the course of the performance of his duties, an action brought against him for a libel in relation to those duties, and he succeeded in that action: could they leave him liable to costs? [The Vice-Chancellor.—Is it not a large proposition to say that, because an action is brought frivolously and vexatiously against a party for doing his

1842.
ATT.-GEN.
v.
COMPTON.

ATT.-GEN.

duty, his employer is to indemnify him? Where is such a proposition to end? It would be dangerous in private life, and destructive of public funds.] There is a class of cases in which the Courts have recognized a considerable latitude ' of powers in persons situated like the present defendants. In The King v. Commissioners of Sewers for the Tower Hamlets (a), it was held to be no valid objection to the rate by the commissioners, that it was made to defray previous law expenses of the commission bond fide incurred by the commissioners in the discharge of their duty: and in The King v. The Inhabitants of Essex (b), it is said by Lord Kenyon, that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence over the county purse have necessarily a right to defray such expenses out of the county purse. The case of the Attorney-General v. Mayor of Norwich (c) involves the same principle. It may be said, that where an action is brought against a sheriff by an insolvent attorney he gets no costs; but a sheriff is paid by poundage; whereas the defendant at law in this case had no remuneration.

Lastly, this Court has no jurisdiction to entertain this suit. In order to bring the case within the jurisdiction, the information alleges that the fund is a charitable fund; but a fund applicable for a public or general purpose, and raised by rates or assessments, is not charitable: Attorney-General v. Heelis (d). [The Vice-Chancellor.—That case is at variance with Attorney-General v. Brown.] At all events, this ought to have been an information and bill, and not an information only. The information alleges that the payments made to Randall are wrongs and grievances to all the rated inhabitants. The proceeding, therefore, being on behalf of the parishioners themselves, some

<sup>(</sup>a) 1 B. & Ad. 232.

<sup>(</sup>b) 4 T. R. 594.

<sup>(</sup>c) 2 Keen, 406.

<sup>(</sup>d) 2 S. & S. 77.

of them, on behalf of all, ought to be plaintiffs: Attorney-General v. Forbes (a); Attorney-General v. Daniel (b). [The Vice-Chancellor.—In Frewin v. Lewis (c) a bill only was filed. It may be conceded, that in the present case an information and bill would have been proper; but does it therefore follow that an information was not proper?]

ATT.-GEN.

Mr. Campbell, for the defendant Randall, took the same line of argument as had been used for the other defendants, contending that this was not a case of charity, but one in which individual rights were concerned, and which therefore required at least an information and bill, if not a bill only. He said that the parties to be benefited by this proceeding were the rate-payers of 1839, and therefore that the pleadings should have been so framed as to admit of an enquiry, whether any of these rate-payers were dead, and if so, who were their personal representatives. Admitting, however, that the present pleadings were sufficient and that there was originally some ground of complaint, he contended that the Court would not now call in question proceedings which had been taken honestly, though mistakenly. In support of this part of his argument, he cited the observations of Lord Eldon in Attorney-General v. Exeter (a). He also contended, that the intention of the stat. 1 & 2 Will. 4, c. 60, was, that the accounts of large parishes should be annually settled, and that after such settlement the auditors should be protected from proceedings in equity. As regarded the defendant Randall more particularly, it was to be observed that he had made no claim upon the directors and guardians, but had delivered his bill to his own client. His client having provided payment for him in a particular manner, did not make him accountable either to the directors and guardians, or to the vestrymen generally.

<sup>(</sup>a) 2 Myl. & Cr. 123. (b) 4 Jurist, 793. (c) 9 Sim. 66. (d) 2 Russ. 54. If the administration of the funds &c.

ATT.-GEN.

Mr. Russell having commenced his reply, by observing that Attorney-General v. Heelis was overruled by Attorney-General v. Mayor of Dublin (a), was stopped by the Court.

THE VICE-CHANCELLOR.—There are certain parts of this case upon which I do not require the counsel for the relators to reply, I mean so far as the argument has proceeded upon the assumption, for the sake of the argument. that the application of the sums in question of which the information complains was unauthorized. These sums were part of a public fund in the hands of certain public officers, devoted to certain public purposes within a certain district, to which purposes it was the duty of those officers to apply them. They were in a sense trustees for that purpose: and, if it were held, that upon a misapplication of monies so circumstanced, it was not competent for a court of equity to interfere, I am not aware what civil remedy there would be in such a case. This is not a question of the legality of a rate, it is a question of the due application of monies, the produce probably in part but not wholly of rates; though I think if it were wholly the produce of rates, it would in substance make no difference for the present purpose. I say that if, the money having thus legally come to the hands of these public trustees, it were not competent to a court of equity to enquire into the due application of the money, there would be an absence of civil remedy, for I have yet to learn the form of action in which a remedy for such a misapplication, producing the recovery of the money, could be obtained.

But supposing the facts of this case to be satisfactorily made out, the competency of a court of equity to interfere is, I think, plain. The same state of circumstances appears to me to prove that the proceed-

ing by information is proper. The right to the fund is not vested in any single individual, or in any number of individuals. The beneficial right to the fund is in the public generally of that district, for whose benefit in a particular manner it is to be applied by the public officers of that district. A mere bill, I apprehend, could not be sustained. Treating it as an ordinary civil demand between man and man, I am not aware that any number of parties who might be represented by given individuals on the record could be accurately represented as having in themselves beneficially the entire interest and property in the thing demanded. That, therefore, the proceeding must be either wholly or partly by information cannot, I think, be doubted.

It is said, however, that the proceeding ought to be by information and bill; and it is said so on this ground, that there is an interest in some person in the due application of the money which renders it improper to proceed by way of information alone. That argument would dispose of ninety-nine cases out of a hundred of those suits which are daily brought before the Court by information alone, because, in a proportion which I think may be represented as great as that which I have stated, the charities or public purposes which are to be administered are charities or public purposes for the benefit of specified individuals or specified classes, the members of which classes must have some interest in it. The rule, I apprehend, is this,—that where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust. it is the privilege of the public that the Crown should be entitled to intervene by its officer for the purpose of asserting, on behalf of the public generally, that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it. I apprehend, therefore, that on principle, as well as on authority, the preATT.-GEN.
COMPTON.

ATT.-GEN.

sent proceeding by information only is a proper proceeding, supposing the sums in question to have been unduly applied.

It is then stated that the suit is not instituted in proper The intention to do the act complained of was avowed and notorious in November, 1839. It was then plainly objected to, and notice that it was objected to was given in the most distinct manner to all persons interested in the act. The act, however, was not done till the following February, and then with full knowledge that it was objected to, and apparently without taking any advice on the subject, the defendants chose to take the step against which this protest had been made. The suit is not immediately instituted; it is not instituted until the following December. Under the circumstances to which I have referred, if this had been the case of an individual complaining of a breach of trust, I should think that the suit had been instituted in sufficient time; à fortiori when it is a suit by the Attorney-General on behalf of the Crown, that is, on behalf of the public, it is instituted in sufficient time. It was not necessary, I think, for the present relators, or for any person on behalf of the parish, or of the public, to have interfered by injunction, though they might on this assumption have effectually applied for an injunction between the month of November and the month of February.

It is then argued, that however inaccurate and undue the application of this fund may have been, yet, on the principle supposed to be recognized in the case of *The Attorney-General* v. *The Corporation of Exeter*, as there was no moral turpitude or intention to do wrong, this Court ought not to interfere. I have never before heard so wide an interpretation put on that case. The extreme danger of allowing such a rule to be acted on is obvious; it requires neither comment nor observation. The expressions used in the case of *The Attorney-General* v. *The Corporation of Exeter* must be

taken, as all judicial expressions ought, with reference to the particular case, beyond which the judge is not to be supposed to go. In that case, a particular mode of executing a particular trust for charitable purposes had been followed by the corporation of Exeter in all its various changes from generation to generation of its individual members, during a very long series of years—I think, considerably more than a century. The question was. whether, that application having been honest though mistaken, the corporation not having applied the charity funds to their own purposes but having distributed them in charity, they should be made to account for the whole time; and it was properly held that they should not. That, I apprehend, has no reference to a dispute of a recent origin, where a trustee from whatever motive chooses knowingly to commit a breach of trust, warned that it is a breach of trust, and that it is so considered, and intended to be so dealt with by those who bring it under the attention of the trustees.

It has been argued also, that as the twelve gentlemen who compose the majority who directed the application of this money, were members of a body, and as the act when done was the act of the body, not of the majority only, therefore the majority are not liable to be sued, and not justly to be complained of in consequence of that act. Such however, I apprehend, is not the rule of a court of equity with respect to the administration of property devoted to public purposes. Treating this board of guardians as a corporation, rejecting, for the sake of the argument, all notion of dealing with them as individuals not incorporated, the rule of this Court, I apprehend, is, that where it finds members of a corporation holding property in trust dealing with or directing that trust property in a manner amounting to a breach of trust, that it will hold them individually responsible for the application of the funds; and as the present application of these funds was the act of

ATT.-GEN.

COMPTON.

ATT.-GEN.
COMPTON.

these twelve gentlemen against the opinion of the minority, and as each one of these was an actor in the breach of trust complained of, I apprehend that the suit is properly brought against them. It is with equal propriety brought against Mr. Randall, who received the money in question direct from the trustees, knowing that it was a trust fund, and knowing that it was to be applied to an improper purpose.

These observations are of course made on the assumption that these sums have been improperly applied. If these sums have been improperly applied, I am of opinion that the suit is right, and that the Court must exercise its jurisdiction. Whether they have been improperly applied is another question; and upon that, as my opinion at present stands, I am disposed to send a case to a court of law, both on the original liability of the board of guardians, the original propriety of the payment, and the effect of the allowance of the accounts by the auditors, which is a very important and general question.

After the Vice-Chancellor had delivered this judgment, and Mr. Russell, by leave of the Court, had argued against granting the defendants a case for the opinion of a court of law, the Vice-Chancellor gave the defendants time to consider whether they would or would not take a case.

March 9th.

On this day the defendants' counsel said that they declined taking a case; whereupon the Vice-Chancellor dismissed the information; directing the defendants to pay the costs of the evidence on both sides, as between party and party; the relators to have their costs as between solicitor and client out of the two sums in question; the residue verified by affidavit to be paid by the defendant Randall to the treasurer of the directors and guardians.

1842.

#### WILKINS v. STEVENS.

THE original bill was filed in 1797, by legatees under Where the inthe will of Thomas Bigge, the elder, praying administration of his estate, and suggesting that part of his assets had been misapplied by Ann Bigge, afterwards Stevens, one of his personal representatives, in the purchase of an estate which she had settled, upon her second marriage, to the use of herself and her second husband, John Stevens. The cause was heard in 1803, and a report was made in 1810: but that report being inconclusive as to the principal dence of facts matter at issue, the Court, upon the hearing of exceptions to the report in 1831, directed an enquiry upon the point. In obedience to that direction, the Master to whom the merely or princause was then referred made his report, whereby, after setting forth a statement of facts, he expressed his opinion to be in accordance with the charge made by the bill. That report however was ordered to be reviewed, and the question afterwards came on before another Master, who arrived at an opposite conclusion.

The facts on which the several Masters founded their corroborated by reports appeared to be as follows:-Thomas Bigge, by his of suspicion. will, devised all his real estate, charged with legacies, and all his residuary personal estate to his son, Thomas Bigge, whom he appointed his sole executor. Upon the death of the testator in 1758, Thomas Bigge, the son, proved the will, and entered into possession of all the testator's real and personal estates. In 1775, Thomas Bigge, the son, died intestate, leaving a widow, Ann Bigge, and a daughter who was his heiress-at-law, and heiress-at-law of the testator, who died intestate, and an infant, in 1778. Upon her husband's death, Ann Bigge took out letters of administration of his personal estate, and continued to occupy the farm, and use the farming stock which had been occu-

#### March 1st.

ability of an administrator to purchase an estate with his own money is relied upon as a ground for following that estate as part of the intestate's assets, such inability must be shewn by evifrom which the strongest conclusion can be drawn, and not cipally by evidence of the opinions of witnesses, though such witnesses may have been well acquainted with the affairs of the party, and their testimony may be circumstances

WILKINS

0.
STEVENS

pied and used by her husband, and before him, by the In 1779, Ann Bigge caused the farming stock to be sold by auction, John Stevens being the auctioneer employed on the occasion. The money produced by this sale amounted to £1,400, which was received by Ann Bigge, but never repaid by her to the testator's estate. In the early part of 1780, she purchased for £800 a copyhold estate at Shitlington, which was the estate in question. Two months after this purchase she married John Stevens; whereupon the estate so purchased was surrendered to such uses as she should, by her last will and testament, or any testamentary writing, whether sole or covert, appoint. After the marriage, she, by will, appointed the estate to John Stevens. In 1795 she died, whereupon Stevens took possession of the estate, and received the rents and profits. Upon his death in December, 1812, it came into the possession of his son, the defendant John Stevens, who, notwithstanding an injunction obtained against him in 1813, conveyed the property away in trust for his creditors.

Relatively to the purchase so made by Ann Bigge, the Masters' reports set forth the deposition of Mr. Wilshire, who acted as the solicitor for the vendor in the sale of the estate, and who was examined as a witness in the cause. After deposing to several of the foregoing facts, he stated that though he could not of his own knowledge say out of what fund the purchase-money was paid, except that it was paid by Ann Bigge, yet at the time of the purchase he understood and believed, and he still believed, that the same was part of the assets of Thomas Bigge, her former husband; and he believed, from his knowledge of the circumstances of Ann Bigge, and her father and family, that she could not have possessed property from any other source sufficient to enable her to make such purchase.

The cause now came on for hearing on exceptions to the

last Master's report, by which the statement in the bill as to the circumstances under which the purchase by Ann Bigge had been made was negatived. WILEINS T.

Mr. Russell and Mr. Mylne, for the exceptions.—It is difficult in these cases, even where the transaction in question is recent, to prove the inability of a party to make the purchase. The time therefore which has elapsed in this case is of no importance. The money has been clearly traced into the hands of Ann Bigge, and is proved to have been in her hands at the time of the purchase. A respectable witness pledges his belief, that she had no money of her own to make the purchase. This evidence is given in the presence of the husband: he could have shewn whence the purchase-money came. The assets of Thomas Bigge, the younger, were included in those of his father, and all were in her possession till the end of 1799. In the beginning of 1780, the purchase takes place; and in the same year the settlement is made on the husband. died in 1812. The assets have disappeared. Under such circumstance the balance of presumption is against the party who is not prepared to shew what became of the assets. If the party makes the purchase at the time he receives the money, the onus is upon him to shew how the trust mories went. [The Vice-Chancellor.—Mr. Sanders, in his Book of Uses and Trusts (a), in observing upon the case of lane v. Dighton (b), takes a contrary view.] Two steps were wanting in that case—the sale of the trust fund, and the purchase of the stock. Lench v. Lench (c).

Mr. Vigram and Mr. Romilly, for the report, were stopped by the Court.

THE VICE-CHANCELLOR.—It is agreed that there does

WILKINS.

b.

STEVENS.

not exist any reasonable chance of obtaining further information in this case. Under such circumstances, considering the length of time over which this litigation has extended, and the remote date of the facts, it is the duty of the Court to arrive at such conclusion as it can. appears that Ann Bigge was the widow and administratrix of a person who was a substantial veoman, and died in 1775, possessed of farming-stock and personal property, with which he carried on the farming business. In 1779, the widow, who had continued the farming business since his decease, declined it, and sold the farming stock by auction, and not long afterwards married the auctioneer. the early part of 1780, she purchased, in her own name, the freehold and copyhold land in question, in the ordinary way, as I take it; treating it as a purchase on her own account. On that state of things the presumption is, that it was a purchase with her own money. The burden of proof lies on them who allege the contrary.

Beyond the circumstances which I have stated, the only evidence for the plaintiff is that of Mr. Wilslire, a professional man, who lived at the time in the same county. but several miles off, and who was concerned as the solicitor for the vendor. He in effect says, that from his own knowledge of the party herself, and her family, he does not believe that she had the means of purchasing the estate, except out of her first husband's assets. There the evidence begins and ends. We are left in the cark as to whether she made any settlement in her own favoir on her first marriage, or whether she subsequently acquired any property to her separate use; and in ignorance of those facts, the Court is asked to take for granted, that n 1742, and from that time to 1780, when the purchase wa made, she had no means of her own to make that purchase. This is far too strong a proposition to be supported before the Court. The statement of Mr. Wilshire might be inportant, if coupled with the proof of additional facts, but in all cases of this nature, it is material to shew by direct evidence the inability of the party to purchase with his own funds. That inability is not shewn in the present case. There is nothing but conjecture on which to come to such a conclusion. In Groves v. Groves (a), decided in 1829, Sir William Alexander, an excellent and experienced lawyer, expresses himself thus as to the claims of the plaintiff in that suit: "The case which the plaintiff must set up and rely upon, is, that he paid the money, though the conveyance was made to Simon Groves; and, therefore, that there was a trust by operation of law for him, and, as a consequence, that he has a right to call for a conveyance. There can be no doubt that when one man pays for an estate, and has it conveyed to another, the grantee, who has the legal estate, is a trustee by operation of law for the purchaser. But I conceive that the fact must be distinctly established by satisfactory evidence." That also is my opinion, though I am aware that my opinion must have infinitely less weight than the opinion of that eminent Judge. Sir William Alexander goes on to say,—"Here it is not so established. The payment of the money is not traced in any manner. As I have already stated, all we know on this subject is from Fox, the attorney, who says that he was employed by Simon to convey the land to him; and that, at the completion of the purchase, when Simon paid for the land, he, Simon, said in the presence of the plaintiff, that he, Simon, bought it to give him a vote. What have we to disprove this? Any evidence that it was paid by a draft of the plaintiff on his banker, or by a bill traced into his hands, or in any other analogous way? No, nothing but loose conversations of Simon's, proved by parol testimony, the most dangerous of all evidence upon such a subject. It appears to me, that, in refusing to act upon such evidence, I follow

WILKINS v.

WILKINS T. STEVENS.

a wise example set me by the Court of Chancery in the case of Gascoigne v. Thuring, in which the Master of the Rolls of that day refused to relieve in a case parallel to the present upon evidence of a similar description." In this case the evidence is, in my judgment, weaker than that with which Sir William Alexander had to deal in Groves v. Groves. There being no proof therefore that this estate was purchased, except in the ordinary way, I feel obliged to say, whatever suspicions I may entertain, that the plaintiffs have failed in their case; but considering all the circumstances, I shall not only order the deposit to be returned, but make the costs of all parties costs in the cause. Therefore let the exceptions be overruled, and the bill as to the Shitlington estate be dismissed, without costs, and without prejudice to such claim as the plaintiffs may have (if any) in respect of the real assets of John Stevens.

The Vice-Chancellor afterwards remarked that he believed that, in strictness, it was not the practice to direct costs to be costs in the cause on exceptions; but that it must be on further directions. The defendants' counsel, however, did not press any objection on this point.

March 4th.

Practice as to costs of dismissing bill where the sole plaintiff becomes insolvent, and the sole defendant is his assignce with a vesting order.

### DANIEL v. HARDING.

THE sole plaintiff in the suit became insolvent, and the whole of his estate was vested in the defendant as his sole assignee by virtue of the stat. 2 & 3 Vict. c. 110, ss. 36, 45.

Mr. G. A. Young, for the defendant, now moved that the bill might be dismissed with costs. He cited Wheeler v. Malins (a) and Williams v. Kinder (b).

(a) 4 Madd. 171.

(b) 4 Ves. 387.

Mr. Ellison, for the plaintiff.

1842. DANIEL HARDING.

THE VICE-CHANCELLOR.—The reasonable course will be to dismiss the bill with costs, the defendant undertaking not to proceed for them otherwise than against the plaintiff's estate.

Ir appearing that, under the act of Parliament mentioned, the defendant has obtained a vesting order for the plaintiff's estate in the Insolvent Court, dismiss the bill with costs; the defendant undertaking not to proceed against the plaintiff personally in respect of the costs, or to take any steps whatsoever, other than for the purpose of obtaining them out of his estate under the vesting order.

## KRATON v. LYNCH.

THIS was a creditors' suit. In support of his case, the To obtain the plaintiff put in evidence a bill of exchange drawn by the plaintiff upon and accepted by the testatrix which became due a short time before her death. It was proved the plaintiff to as an exhibit.

THE VICE-CHANCELLOR.—Such meagre evidence as this is not sufficient to ground the usual decree. Inquire whether any and what debt was due from the testatrix to deration? the plaintiff at the time of her decease.

March 17th.

usual decree in a creditors' suit, it is not sufficient for put in an acceptance of the testator, proved as an exhibit. Quære, whether any evidence should be given of the consi-

117w.902

1842.

March 19th.

THORBY v. YEATS.

Trustees of the separate estate of a married woman decreed to pay the costs of a suit instituted to compel them to transfer the fund into her name.

On a bill by a married woman against her trustees to obtain a transfer of her separate property, it is not in ordinary cases necessary to prove the marriage.

riage.

To a bill brought by a married woman against her trustees in respect of her separate property, the husband should be a defendant.

GREGORY GEERING, by his will, gave and bequeathed to his sister, Mary Ann Geering (since deceased), and the defendants, Yeats and Harrison, £1000, £3 per cent. consols, upon trust, to transfer the same to the plaintiff, his niece, who was then a spinster, upon her attaining the age of twenty-one years, for her separate use, and free from the control of any husband she might marry; but in case she should die under twenty-one, he declared that the said Bank annuities should fall into the residue of his estate, and be disposed of accordingly. And the testator appointed his sister and Yeats his executrix and executor.

All the testator's debts having been duly paid by the executors, the £1000 was, after the death of Mary Ann Geering, transferred into the joint names of the defendants Yeats and Harrison.

The plaintiff attained her age of twenty-one years in July, 1835; and in October, 1838, she married Thomas Thorby. No settlement of the consols was made on the marriage, or afterwards.

Soon after the marriage, application was made to the trustees for a transfer to the plaintiff of the consols. The application was met by various excuses, and ultimately by a positive refusal (notwithstanding high legal advice had been obtained in favour of the plaintiff) to transfer the fund, except under the authority of a Court of Equity. The present bill was therefore filed against the trustees and Thomas Thorby, praying for a transfer of the stock into the name of the plaintiff for her separate use, or as she should direct; and that the trustees might be decreed to pay the costs of the suit.

The trustees by their answer alleged that a promise had been exacted from the defendant Yeats by the testator, never to part with the fund to the plaintiff. On this is ground, and on the general ground of indemnity, they insisted that they had a right to the protection of the Court.

THORBY

The trustees throughout their answer mentioned the plaintiff's marriage as an "alleged marriage;" whereupon the plaintiff entered into evidence to prove the marriage.

## Mr. Kenyon Parker and Mr. Campbell, for the plaintiff.

Mr. Russell and Mr. Stinton, for the defendants, the trustees, contended that they were not liable to pay costs: Knight v. Martin (a); Certainly not the costs of proving the marriage, as proof was unnecessary; nor the costs of the husband, as he ought to have been a plaintiff. Though this related to the separate estate of the wife, yet it was not a suit between husband and wife, but against the trustees; in which both husband and wife had a common interest.

# Mr. Hislop Clarke, for the defendant Thorby.

THE VICE-CHANCELLOR said that the husband was properly made a defendant, and was entitled to his costs. As to the marriage, the evidence was unnecessarily entered into, for, notwithstanding the expression in the answer of the trustees, there was sufficient to shew their belief of the marriage. Considering however the singularity of the answer, he should not order the plaintiff to pay the costs of the evidence: as to that, no costs must be given on either side. The costs of the residue of the suit must be paid by the trustees.

LET the defendants, the trustees, transfer the £1000 consols (the amount of legacy duty being first paid) into the name of the plaintiff.

THORBY

Tax the costs of the plaintiff, other than and except the depositions in the cause. Tax the costs of the defendant, Thomas Thorby, and let the plaintiff's next friend pay the same. Let what shall be so paid for the costs of the defendant Thorby be added to the plaintiff's costs so directed to be taxed, and the Master certify the total amount; and let the amount be paid by the defendants, the trustees, to the plaintiff's next friend.

April 21st.

To obtain an order for entering an appearance under the 8th of the Orders of August, 1841, it must appear from the affidavit of service where the defendant was served.

# DAVIS v. Hole.

M.R. MYLNE, for the plaintiff, moved for liberty to enter an appearance for the defendant, William Hole, under the 8th of the Orders of August, 1841. He produced an affidavit to the effect that the deponent, John Golding, had personally served the defendant, by delivering to him a true copy of the subpæna and indorsement, and shewing to him the original &c.; but the affidavit did not state where the defendant was served.

THE VICE-CHANCELLOR.—Where you merely state in the affidavit that you personally served the defendant, you must shew where he was served. He may have been served out of the jurisdiction.

April 23rd.

On this day, Mylne produced a farther affidavit, by which it appeared that the defendant was served with the sub-pæna in the Queen's Bench prison. Whereupon the Vice-Chancellor made an order in the form usually adopted in such cases in his Court (a).

(a) See ante, p. 203.

Shipperdson v. Tower.

GEORGE BAKER, of Elemore Hall, in the county of Testator, by his Durham, Esq., by his will, dated the 5th of July, 1833,

1842.

Apr.16th, 18th, May 22nd. will, gave to his grand-daughter G., whom he

described as the eldest daughter of his the testator's daughter I., an annuity of £100 for her life, in case she should attain the age of 18 years. He also gave to his grandson C., second son of his said daughter I., the sum of £2000, but in case he should die under 21, then he, the testator, bequeathed the said sum to his said grand-daughter G. The testator then having given other legacies and annuities, which as well as the gifts to G. were charged on his real estate, bequeathed the residue of his personal estate and effects in trust for such child of his said daughter I., as should first attain the age of 21 years, for his or her absolute use and benefit. He then devised his real estates in trust for his grandson H., the eldest son of his daughter I., for life, with remainders in strict settlement; and by a codicil he bequeathed to his daughter and her husband the use of his plate, linen, and furniture, so long as they should reside in and occupy his house at E. (in which they had a life interest), with a direction that after their decease, or ceasing to reside, the said books, &c. should remain and be held upon the same trusts and purposes as he had by his will declared concerning his residuary personal estate: G. was the eldest child of the testator's daughter I., and attained the age of 21:—Held, that she was entitled to the residue of the testator's personal estate.

Testator after directing his debts, funeral, and testamentary expenses to be paid as soon as conveniently might be after his death, bequeathed several annuities and pecuniary legacies to various persons, directing the legacies, except one which was given to a person under 21, to be paid within 12 calendar months after his death. He then declared that the several annuities thereinbefore bequeathed should be charged upon his real estates. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses, and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy :- Held, that the annuities were primarily, if not solely, charged upon the testator's real estate; and that under the term "legacies," he did not mean to comprise annuities.

Testator being seised in fee of freehold collieries, for which he received a certain rent, and being entitled to several shares in a leasehold colliery, bequeathed various annuities and legacies, which he charged upon his real estate in ald of his personalty. He then by a codicil directed that all annuities and legacies left by him in his will, his real estate being free from all mertgages, &c., should be paid out of the certain rents and profits of his collieries, and that his estate might not be burdened with them :-Held, that the word "collieries" in the codicil meant the testator's freehold collieries, and did not refer to his shares in the leasehold colliery; and that it was not the object of the codicil either to relieve or burden the personal estate, but only to throw on the freehold collieries such burden as would otherwise have fallen on the whole real estate.

Testator after devising his real estates in strict settlement, subject to the payment of his debts and legacies, declared that it should be lawful for his trustees, and he authorized and empowered them, if they in their discretion should think fit, absolutely to sell his estate at C.; and after giving them full powers in regard to the conduct of the sale, he directed and declared that they should stand possessed of the monies arising from the sale upon trust, after payment of all costs, to apply and dispose of the remainder in such manner as thereinbefore had been directed concerning the residue of his the testator's personal estate. One of the trustees was afterwards removed from his office by a codicil. The sale of the estate was not required for the payment of debts or legacies :- Held, that the power of sale vested in the trus-

tees was discretionary, and that the residuary legatee of the personalty could not compel a sale.

There were two inconsistent clauses in a will. By the former the surplus rents of the testator's real estates, after maintenance of the person entitled to the possession until 25, were added to the residue of the personal estate. By the latter the surplus rents, after maintenance of such person until 21 (provided his attaining 21 happened within the legal limit of time), were settled upon the same trusts as the realty. Testator then by a codicil reciting the former clause, directed that the person entitled to the possession of the estate should be let into the receipt of the rents and profits at 21:—Held, that, as the codicil merely affected the surplus rents between the ages of 21 and 25, and as in other respects the latter of the two clauses in

N. C. C. Infra. p. 6

1842. Shipperdson s. Tower.

after directing his debts, funeral and testamentary expenses to be paid as soon as conveniently might be after his death, gave and bequeathed to his grand-daughter Georgiana Isabella Tower, the eldest daughter of his the testator's daughter, Isabella Judith, the wife of Henry Tower, Esq., for her life, in case she should attain the age of 18 years, an annuity of £100, to be paid to her in two equal portions in every year for her separate use and benefit, exclusively of any husband to whom she might be married. The testator then, after bequeathing several other annuities, gave to his grandson Convers Tower, second son of his said daughter, Isabella Judith, the wife of the said Henry Tower, the sum of £5000, to be paid to him on his attaining the age of 21 years; but in case he should die under that age, then he gave and bequeathed the said sum of £5000 to his said grand-daughter Georgiana Isabella Tower, to be paid to her on her attaining the age of 21 years, but without any interest in the mean time; and he directed that notwithstanding the postponement of the time of payment of the said legacy to the said Georgiana Isabella Tower, the said legacy should become vested in her immediately on her attaining the age of 21 years, or marrying, which should first happen. The testator then gave various other pecuniary legacies, which he directed to be paid within 12 calendar months after his death. then directed that the several annuities thereinbefore by his said will bequeathed as aforesaid, should be charged and chargeable upon all and every his freehold messuages. lands, tenements, and hereditaments, and real estate whatsoever, with powers of distress and entry for the several annuitants. And the testator charged and made chargeable all his said messuages, lands, tenements, and heredi-

the will was more probably consistent with the testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil. The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative.

taments and real estate with the payment of all his debts, funeral and testamentary expenses and legacies, or of such SHIPPERDSON part thereof as his personal estate not thereinbefore or thereinafter specifically bequeathed should be insufficient to pay and satisfy. And he did thereby declare his will and mind to be that his trustees and executors, and the survivors or survivor of them, and the executors and administrators of such survivor, should during the minority of his said grandson Convers Tower, and within 12 calendar months after his the testator's decease, lav out and invest the said legacy of £5000 thereby given to his said grandson in their or his names or name in the parliamentary stocks or funds, or at interest in government or real securities, in England, so that the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce and the resulting income thereof, or the unapplied part of such resulting income, might accumulate in the way of compound interest. And the testator did thereby further declare that, notwithstanding the directions thereinbefore contained, his trustees and executors, or the survivors or survivor of them, or the executors or administrators of such survivor, should have full power to apply the dividends, interest, and annual proceeds of the said stocks, funds, and securities, or so much thereof as they or he might think proper, towards the maintenance or education of the said Convers Tower. And as to all the rest, residue, and remainder of his personal estate and effects whatsoever and wheresoever, not thereinbefore specifically bequeathed, he gave and bequeathed the same and every part thereof unto John Dalton, Thomas Richard Shipperdson, and Thomas Forster, their executors, administrators, and assigns, upon trust to collect, get in, and receive all such parts thereof as should not consist of ready money. and with all convenient speed to pay and apply the monies arising from the same, and which should be so collected and received, and his ready money at his death, in paying

1842. Tower. 1842. SHIPPERDSON 5. TOWER. and discharging any mortgage and other debts, (as well debts due and owing from him the testator individually, as debts due and owing from him jointly with any other person or persons), and funeral and testamentary expenses, and the several legacies given by his said will: and in case there should be any residue or surplus of his said residuary personal estate and effects after such payment thereout as aforesaid, then all such surplus and residue should belong to, and be in trust for such child of his said daughter Isabella Judith, as should first attain the age of 21 years, for his or her absolute use and benefit.

The testator then gave and devised all and singular his freehold and copyhold messuages, lands, tenements, and all his real estates, whatsoever and wheresoever, which he had power to dispose of by his will, (except such as were vested in him upon any trust, or by way of mortgage), with their and every of their appurtenances, unto and to the use of the said John Dalton, Thomas Richard Shipperdson, and Thomas Forster, their heirs and assigns, upon the trusts thereinafter declared or referred to, (that is to say), subject to the charges thereinbefore made upon his said real estate, in trust for his grandson Henry John Tower, the eldest son of his said daughter Isabella Judith. during the term of his life, with remainder in trust for the only son, or in case there should be more than one son, for the first and other sons of the said Henry John Tower severally and successively in tail male, with divers remainders over. The testator then directed as follows: "And I do hereby declare, that if any person living at my decease, and for the time being entitled under this my will to the actual possession or to the receipt of the rents and profits of my real estates hereinbefore devised, or any part thereof, shall be under the age of 25 years, my said trustees, and the survivors or survivor of them, and the executors or administrators of such survivor, shall, so long as the person entitled as aforesaid shall be under the age of 25 years,

receive and take the rents and profits of the said real estates, and until such person shall attain the age of 21 years, apply a competent part thereof for his maintenance and education; and from and after his attaining the said age of 21 years, and until he shall attain 25, shall pay to him the several and respective annual sums thereinafter mentioned, (that is to say) during the first year, the sum of £600; during the second year, the sum of £700; during the third year, the sum of £800; and during the fourth vear, the sum of £900. And I direct that my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall stand possessed of the residue of the said rents and profits upon such and the same trusts as I have hereinbefore declared with respect to the residue of my personal estate and effects."

The testator then, after giving powers of leasing to the tenants for life and in tail, and to the trustees during their minority, declared that it should be lawful for the said John Dalton, Thomas Shipperdson, and Thomas Forster, and the survivors and survivor of them, and the executors and administrators of such survivor, and he did thereby fully authorize and empower them or him, if they or he, in their or his discretion, should think fit, absolutely to sell and dispose of his estate, lands, and tenements, situate at Crook and Hownes, in the said county of Durham, with the appurtenances, or any part or parts thereof, discharged of and from the several annuities and other charges thereby created, either together or in parcels, and either by public auction or private contract, as they or he should think best, for such price or prices, or sum or sums of money, as in their or his opinion could be obtained or reasonably expected for the same; and that for the purpose of effectuating any such sale or sales, it should be lawful for the said John Dalton, Thomas Shipperdson, and Thomas Forster, or the survivors, &c., by any deed SHIPPERDSON TOWER. SHIPPERDSON v.
Tower.

duly executed by them or him, to revoke the trusts thereinbefore or thereinafter declared, or which should be declared by any codicil thereto, concerning the hereditaments which might be so sold, and to declare such other trusts of and concerning the same as it might be thought necessary or expedient to appoint, in order to effectuate any such sale. And the testator, after declaring that the receipt or receipts of the said trustees or trustee should effectually discharge the purchasers, directed and declared that his said trustees, and the survivors, &c., should stand possessed of the monies to arise from such sale or sales. upon trust, in the first place, to retain and reimburse themselves or himself, all costs and expenses attending the said sale or sales, and to apply and dispose of the remainder of the same monies for such purposes and in such manner in all respects as was thereinbefore directed concerning the residue of his personal estate.

The testator then gave a general power to the trustees, at the request of the tenants for life, or tenants in tail, to dispose of, either by way of sale or in exchange, for other hereditaments in England or Wales, all or any part of the devised estates; and he directed that the estates so to be purchased or taken in exchange, should be settled upon the trusts and subject to the powers, provisions, and declarations as were thereinbefore expressed and contained of and concerning the hereditaments so to be sold or given in exchange, or as near thereto as the nature and quality of the said estates and other circumstances would admit of. The testator then declared as follows: "Provided always, and I hereby further declare, that if at any time hereafter any person hereby made tenant for life of my said real estates hereinbefore devised, shall, when he or she shall become beneficially entitled to the possession or receipt of the rents and profits of my said real estates, or any part thereof, be under the age of 21 years; or if any person hereby made tenant in tail male, or in tail, of my said real

estates, shall be, when he or she shall become beneficially entitled to the possession, or to the receipt of the rents and profits thereof, under the age of 21 years, provided such last-mentioned event shall happen within the period of 21 years from my decease, then, and in either of these cases, it shall be lawful for the trustees or trustee for the time being of this my will, during the minority of such tenant for life, and during such proportionable part of the minority of such tenant in tail male, or in tail, as shall arise within 21 years from my decease, to enter into, and hold possession of, my said real estates, or any part thereof, and receive and take the rents and profits thereof, and by and out of the same apply any annual sum or sums of money, according to the age of such minor, as they my said trustees or trustee, for the time being, shall think proper, for and towards the maintenance of such minor, and subject thereto, to lay out and invest the surplus of the said yearly rents and profits in the names or name of my said trustees or trustee, in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England, to be from time to time altered and varied, as occasion shall require; and also to receive the interest, dividends, and annual proceeds thereof, and from time to time to make similar and repeated investments thereof, so that the said rents and profits may accumulate in the way of compound interest. And I do hereby declare, that at the end of each such respective period of accumulation, or sooner, if the said trustees or trustee shall think proper, they or he shall call in and convert the said accumulated fund into money, and apply the same in satisfaction and discharge of any principal sams of money which shall then affect my said real estates hereinbefore devised, or any part thereof, together with the interest thereof, whether such incumbrances shall be subsisting thereon at my decease, or shall have been created in pursuance of any trusts or powers herein contained, and

1842.
SHIPPERDSON

TOWER.

1842.
SHIPPERDSON v.
TOWER.

whether such monies and accumulated funds shall have proceeded from the rents and profits of the parts so encumbered or not, and do and shall stand possessed of, and interested in the rest of the said trust monies, if any, upon the same trusts herein declared or referred to concerning the money to arise from the sale by this, my will, authorized to be made of my said real estates." And the testator appointed the said John Dalton, Thomas Richard Shipperdson, and Thomas Forster, executors of his will.

The testator made five codicils to his will. By the first, dated the 5th July, 1833, he gave and bequeathed to the trustees and executors named in his will, all his books, plate, linen, and household furniture, upon trust, in case and so long as his said daughter, Isabella Judith, and her husband, Henry Tower, or either of them, should reside in and occupy his mansion-house at Elemore, (in which they had life interests under their marriage settlement), to permit and suffer his said daughter and her husband, and the survivor of them, to have the use and enjoyment of the said books, plate, linen, and household furniture; and after the decease of the survivor of them, or after she or he should have ceased to reside in and occupy his said mansion-house, he directed that the said books, plate, linen, and household furniture, should remain and be held upon and for the same trusts, intents, and purposes, as he, the testator, had in and by his said will declared of and concerning his residuary personal estate, or such and so many of the said trusts, intents, and purposes, as should be then subsisting, undetermined, and capable of taking effect.

By the second codicil, dated the 31st October, 1836, the testator, after reciting that he had devised his real and personal estate to the said John Dalton, T. R. Shipperdson, and Thomas Forster, and appointed them executors of his said will, and that he had bequeathed to the said John Dalton a legacy of £200, revoked his said will so far as the said John Dalton was an object thereof, and substi-

tuted John Douthwaite Nesham in his place, and declared that his said will should take effect, except as to the said legacy of £200, in the same manner as if the name of John Douthwaite Nesham had been originally inserted therein instead of the name of the said John Dalton. reciting that by his said will he had directed that if any person living at his decease, and for the time being entitled to the actual possession of his real estate, or any part thereof, should be under the age of 25 years, his trustees should. so long as the person so entitled should be under the age of 25 years, receive and take the rents and profits of his said real estates, the testator by the present codicil declared it to be his will, that when and so soon as the person for the time being entitled should attain the age of 21 years, he should be let into possession and receipt of the rents and profits of the whole of his real estates, in the same manner as he would have been entitled to by virtue of his said will on attaining the age of 25 years. And he gave to his butler. John Morris, as a reward for his faithful services, an annuity of £25 during his life, clear of legacy duty, and he directed that the said annuity should be paid and payable on the same days and times, and in the same manner as the annuities bequeathed by his will.

By the fourth codicil, dated the 9th March, 1837, the testator declared it to be his will, and he requested that his grandson Henry John Tower might complete his school education at Harrow School, and that if he should afterwards go to the university of Cambridge his trustees and executors should pay or allow to him during his minority, out of the annual income of his the testator's real estate and of his residuary personal estate, the annual sums therein mentioned; but if his said grandson should determine upon going into the army, then the testator directed his said trustees and executors, out of his residuary personal estate, to purchase a commission for him, and thenceforth to pay or allow to him out of the annual

1842. Shipperdson v. Tower. 1842. Shipperdson v. Tower.

income of his real estate and of his residuary personal estate, the annual sums therein mentioned until his said grandson should attain the age of 21 years. And the testator charged and made chargeable all and every his collieries and coal mines, seam and seams of coal, within and under the lands and grounds situate within the manors. precincts, or territories of Elemore, Elemore Hall, Little Haswell, Haswell Grange, Hetton-le-Hole, Hetton-on-the-Hill, and Moorsley, or elsewhere in the parishes of Easington and Pittington, in the county of Durham, of which said collieries and coal mines, seam and seams of coal he had granted a lease to the Hetton Coal Company, with the payment of as well the said annuity thereby bequeathed as of the annuity bequeathed by his will, with power of entry and distress in case of non-payment. And he also gave and bequeathed to Georgiana Isabella Tower, and her three sisters, the sum of £2000 each, when they should respectively attain the age of 21 years, or marry, which should first happen, but without any interest in the mean time; and in all other respects he ratified and confirmed and published his will.

The fifth codicil, which was without date, was as follows:—" And I further direct that all annuities and legacies left by me in my will and codicils, my real estate being free from all mortgages, &c., shall be paid out of the certain rents and profits of my collieries, and that my estate may not be burthened with them."

The testator died in May, 1837. Soon after his decease the present suit was instituted by the trustees and executors of his will for the purpose of obtaining the directions of the Court. The cause was heard before the Vice-Chancellor of England, when His Honor made a decree establishing the will, directing the usual accounts of the personal estate of the testator and of his debts, &c., and ordering that the personal estate should be applied in payment of his debts and funeral expenses, in a due course of admi-

nistration, and then in payment of the legacies and arrears of the annuities. The decree then, after directing the usual enquiries as to the testator's freehold estates, contained directions to the Master to enquire as to the state of the family of the testator's daughter Isabella Judith Tower; and also (amongst various other matters) what interest the testator, at the time of making his fourth codicil and of his death, had in the collieries mentioned in the fourth codicil, and what certain rents and profits he was at the time of his death receiving from his collieries, or any and which of them; also what interest he had in a certain colliery called the Heaton colliery in the pleadings mentioned, and whether he had any and what certain rents arising therefrom

1842. Shipperdson v. Tower.

With respect to the state of the family of the testator's daughter, the Master found as follows:—That there was issue of Isabella Judith Tower living at the time of the testator's death, six children, and no more, of whom Georgiana Isabella Tower was, at the date of the report, in her 25th year, Emma in her 22nd year, and the others infants; that all such children were at the date of the report living and unmarried, and had no issue; and that Isabella Judith Tower had not had any child born after the date of the will.

As to the last-mentioned subjects of enquiry the Master found that the testator was, at the time of making his fourth codicil and of his death, entitled to an estate in fee simple in the colleries mentioned in the fourth codicil, subject to the lease to the Hetton Coal Company in such codicil mentioned, and that he was receiving at the time of his death, the clear certain yearly rent of £2750, being the certain rent reserved in and by such lease; but that he had not, nor was receiving at the time of his death any other certain rents from his collieries, or any of them; and that his interest in the Heaton colliery consisted of a cer-

1842. Shipperdson v. Tower. tain number of shares in a company who were possessed of a lease of such colliery.

The cause now came on for hearing on further directions, and the principal question was what interest Georgiana Isabella, the eldest child of Isabella Judith Tower, took under the testator's will. She claimed—

- 1. The whole residue of the testator's personal estate, exempt from payment of the annuities and legacies.
- 2. The Crook and Hownes estate. (Under the power of sale and declaration of trusts (a) contained in the will.) This estate, it was admitted, remained unsold.
- 3. The surplus rents of the real estates, which, after providing for the maintenance and education of the eldest son, would accrue due until he attained 21 (b).

# Mr. Purvis and Mr. Toller, for the plaintiffs.

Mr. Russell and Mr. De Gex, for the defendant Georgiana Isabella Tower:—First, it is clear that Miss Tower, being the first child of Mrs. Tower who attained 21, is the residuary legatee of the testator. The words "or her," if there were any question, would put the matter out of doubt. That being so, what is the nature of the residue she is to take? Not the testator's personal estate after all charges paid, but after what is specifically disposed of. Now the real estate is at least the primary fund for the payment of the annuities; and there is a power in the will which makes it the sole fund for that purpose. With respect to the legacies, the real estate is by the will made chargeable only in aid of the personalty, but by the undated codicil, both the annuities and the legacies are charged exclusively on the certain rents and profits of the testator's freehold

<sup>(</sup>a) See ante, p. 445.

<sup>(</sup>b) See the clause within inverted commas (ante, p. 444), and

the second codicil (ante, p. 448), as opposed to the clause within inverted commas (ante, p. 446).

collieries; no part of the testator's estate is to be burdened with them, except these rents and profits. The word "collieries" in the undated codicil refers only to his freehold collieries; for it cannot be said that the Heaton colliery, in which he had shares only as a partner, was his. The words "my estate" comprehend his personal estate.

1842.
SHIPPERDSON
v.
Tower.

Secondly, as to the Crook and Hownes estate. If the trustees had sold that estate, the monies would have gone in the same manner as the personalty. The question is, whether the beneficial enjoyment of this property is to depend on the exercise of their discretion. The gift is in form a power to the trustees to sell, but it is not merely a discretionary power. The words, though in the first instance they appear discretionary, are imperative when the testator directs the dealing with the proceeds. He could not intend that the members of the family should be affected by the acts of the trustees. One of them. Dalton, was removed from his office by a codicil. The Court will dispose of the estate in the same way as if a sale had actually been made: Grieveson v. Kirsopp (a). [The Vice-Chancellor.—Is a sale necessary here for the purpose of paying the debts and legacies? It must be admitted that it is not.

Thirdly, the title of Miss Tower to the surplus rents arises under a clause in the will, which, even if it be at variance with a subsequent clause in the will, is distinctly recognized by the second codicil. That codicil admits the clause in question by cutting down the claim of the residuary legatee to the surplus rents to the period of the tenant for life attaining 21, instead of 25.

Mr. Wigram and Mr. Freeling, for the defendant Henry John Tower.—It is agreed that the devolution of the 1842. Shipperdson v. Tower.

Crook and Hownes estate ought not to depend on the discretion of the trustees. Yet that would be the consequence if the real estate and the residuary personal estate are to go in different channels. The testator, however, never intended that. He could not, for instance, intend to leave away the furniture in the house where his grandson was to reside. But supposing that the realty and personalty are separated, the personalty is not exonerated to the extent contended for on the other side. legacies at least are charged on the personalty, and the undated codicil makes no difference in that respect. testator intended by that codicil to exempt his real estate in general, and to charge the collieries. Vice-Chancellor.—Is not the word " collieries" to be confined to freehold collieries?] There is nothing to shew that. Substantially, the leasehold collieries were the testator's as well as the freehold. But if the freehold collieries only are referred to, the object of this codicil seems to have been merely to point out which real estate was to be first applied in discharge of the incumbrances to which the real estates were subject, and not to affect the personalty at all.

The disposition of the surplus rents depends upon one of two distinct clauses in the will. We submit that the latter clause must be adopted. It cannot be said, that, up to the period of the eldest son attaining 21, the latter clause does not comprehend every thing that is contained in the former. For instance, the provision for maintenance up to that period is more full in the latter clause. The principal object of the first clause is to provide for a period between the ages of 21 and 25; but that object is entirely removed by the second codicil. The consequence is, that the second of the two clauses being more comprehensive, and standing last in the will, must prevail.

Mr. Russell, in the course of his reply, upon the question

as to the extent of the exemption of the personalty, cited Williams v. The Bishop of Llandaff (a).

SHIPPERDSON

TOWER.

May 22nd,

July 2. fo. 686

1842.

THE VICE-CHANCELLOR.—The questions in this case are questions of construction arising upon the will and codicils of the late Mr. Baker, of Elemore Hall. The first is whether his real estate or some part of it is the primary fund, if not the sole fund, for payment of the annuities given by his will. The language of the decree (though, as I learn from the Bar, the Court did not intend to decide any point of construction) may possibly preclude me from saying that the real estate, or any part of it, is the sole fund for this purpose; but I am not, I think, precluded from giving effect to the opinion which I entertain, that if the personal estate is liable to these annuities, it is only secondarily and as an auxiliary fund that it is so liable.

The direct terms of charge upon the real estate in which the testator with regard to them has expressed himself, coupled and compared with the very different language in which he has provided for the payment of his debts, funeral and testamentary expenses and legacies (under which term "legacies" it is, I think, plain that he does not mean to comprise annuities)—saying that he charges his real estate with the payment of all his debts, funeral, and testamentary expenses and legacies, or of such part thereof as his personal estate not thereinbefore or thereinafter specifically (by which he means particularly) bequeathed, should be insufficient to pay and satisfy, (there not being any analogous phraseology with respect to the annuities)—as well as the form of the trusts which he has declared of his general residuary personal estate, satisfy me of the correctness of the construction which I have stated, so far at least as the will is concerned. But it has been argued that however this may be as to the will, an important difference is made by the undated codicil, which all parties agree in representing as the last codicil, SHIPPERDSON 9.

and which certainly is obscurely worded. It is thus:-[His Honor here read the last codicil.]—Upon this codicil, however, taken, so far as it ought to be taken, in connection with the fourth codicil, and with such facts legally admissible in evidence as appear on the Master's report, I am of opinion, first, that the word "collieries" means the testator's freehold collieries, which were let and produced a certain and considerable revenue, and cannot be considered as properly comprising or applicable to his interest in the chattel leasehold coal concern in which he had shares: secondly, that he did not intend by the undated codicil to relieve or to burthen his personal estate to any extent or in any manner: and thirdly, that its only object was to declare that as between different portions of his real estate one should exonerate the other from such charge of annuities and legacies as the whole had been subjected to. I hold, therefore, that by the undated codicil there is thrown on the freehold collieries such burthen of annuities and legacies, and such only, as but for this codicil would have fallen on the whole real estate. To give it any other effect would, as it seems to me, be to allow an intention strongly and clearly expressed by one testamentary instrument to be defeated by expressions of a doubtful and obscure nature in another; which ought not to be. It is incumbent on the residuary legatee to shew that the effect of this codicil on the other testamentary dispositions is that for which she contends; and in my judgment she has not done so. The language of Tindal, C. J., in Doe v. Hicks (a), and the note in 6 Sim. 395, may here perhaps be properly referred to.

The annuity of £25, which one of the codicils gives to John Morris, and which the testator directs to be paid and payable on the same days and times and in the same manner as the annuities bequeathed by his will, must, I think, be considered as charged by the effect of the several testa-

mentary instruments on the freehold collieries primarily or exclusively in the same manner as the annuities given by the will.

1842. Shipperdson b. Tower.

With regard to the fourth codicil, the annual sums which it directs to be allowed or paid to Henry John Tower, ought, I think, according to the proper construction of that codicil and the other testamentary instruments, to fall rateably on the general personal estate, and on the freehold collieries. It may possibly deserve consideration how far this is consistent with the language of the order of 18th December, 1840.

Miss Georgiana Tower waives expressly, as I understand, any claim in respect of the additional annuity of £100 which the testator had by this codicil intended to give to her, and as to which the erasure in it occurs (a). This should be stated in the order. I apprehend that the legacies which it gives to herself and her sisters, must, as well as the other legacies and the purchase-money for Henry John Tower's commission, fall on the general personal estate, which has been stated to be amply sufficient to answer all the charges upon it.

I have collected, (but I am not sure whether accurately), that Miss Tower consents that the general personal estate shall be charged with the £500 mentioned in the order of 7th May 1841, and not be indemnified in that respect. If she does not so consent, this point may require further consideration. If she does so consent, it should be stated in the order.

Miss Tower being of age, and being the first child of the testator's daughter, Mrs. Tower, who lived to attain majority, must, I think, be declared to be the general residuary legatee of the personal estate for her own benefit. There

<sup>(</sup>a) This erasure was mentioned in argument, but all discussion upon it was waived by consent. The following cases were referred

to:—Larkins v. Larkins, 3 B. & P. 16; Kirke v. Kirke, 4 Russ. 435, 439, 440; Onions v. Tyrer, 1 P. W. 343.

1842. Shipperdson 5. Tower. are passages in the testator's testamentary dispositions which may be thought to justify a doubt whether he intended this; but they are not in my judgment clear or strong enough to warrant the Court in refusing to give effect to the plain terms in which he has said, by his will, that the grandchild so circumstanced should be his residuary legatee.

The next question made is, as to a portion of the real estate situate at Crook and Hownes, the subject of the following clause:-[His Honor here read the power of sale and declaration of trust of the purchase-money of the Crook and Hownes estate (a). ]-Considering the different dispositions of the real and personal estate, the clause is extraordinary certainly in its nature. The admitted facts, however, are, that this portion of the real estate has not been sold; that it is not required for the purpose of paying any debt or charge on the real estate to be sold; and that the trustees have not considered, and do not consider, that it ought to be sold, but desire that such, if any, discretionary power as in this respect was given to them by the testator, should be exercised by the Court, if at all, and not by themselves. Notwithstanding which, it is contended on behalf of Miss Tower, the residuary legatee, that by the true meaning and effect of the clause, the estate at Crook and Hownes belongs to her, or ought peremptorily to be sold for her benefit. To this I cannot accede; being of opinion, under the circumstances which I have mentioned, that this estate has remained and must continue unconverted. The clause cannot, according to a correct reading or interpretation of it, be in my opinion considered as directing a sale under all circumstances, or as being tantamount to a positive gift to Miss Tower. There was a discretion to be, which has not been, and probably never will, if it ever can be, exercised; and if it cannot, or until it shall be exercised, this property remains, I think, real estate of the testator for all the purposes of his testamentary dispositions. This claim, therefore, on the part of Miss Tower fails.

1842.
SHIPPERDSON

TOWER.

The only remaining question, I believe, is as to the title to the surplus rents of the real estates during the minority of Henry John Tower, the first tenant for life under the limitations created by the testator.

The will contains these two clauses, which are difficult, if possible, to be wholly reconciled:—[His Honor here read the two clauses of the will which are contained respectively within inverted commas (a), and then referred to that part of the second codicil which recites the former of rents during Henry John Tower's minority are under these provisions claimed by Miss Tower, the residuary legatee of the personalty; and she insists, first, that she is entitled to them under the will if taken simply and by itself; and secondly, that if that were otherwise or were doubtful, her title to them under the will and second codicil taken, together, is clear. This claim is resisted on the part of Henry John Tower, alleging that these surplus rents are governed by the latter of the two clauses of the will which I have read. It has not been contended on his part, or on the part of the heiress-at-law, or her husband, that for the benefit of either of them the whole or any part of the several provisions relating to these surplus rents should be treated as void for uncertainty. Had I felt myself much embarrassed by this latter point, I should have desired it to be argued.

The rule in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is, as we know, applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render

<sup>(</sup>a) Ante, pp. 444, 446. (b) Ante, p. 449.

1842. Seipperdson v. Tower. every part of them operative. And in the present case, the residuary legatee contends, that such, if any, title to preference as might be claimed for the second of the clauses under consideration over the first, in the absence of the codicil of the 31st of October, 1836, is defeated by the recognition of the first which that codicil contains—a recognition alleged by her to be destructive of the second, so far as varying from the first.

I have found it exceedingly difficult to arrive at a conclusion as to the mode in which the application of the rents in question ought to be directed; nor is my opinion confident in the correctness of that which after much consideration appears to me the best. But upon the whole, construing the second clause as directory and not as merely permissive-construing the words " sale by this my will authorized to be made of my real estates," as referring to the general power of sale and exchange, and not to that power of sale which is confined to the property at Crook and Hownes-seeing that the second clause, which exhibits care in its preparation, does not interfere with the first clause as to rents between the ages of 21 and 25-seeing that the codicil of 31st October, 1836, in this respect deals only with rents between the ages of 21 and 25, to which the second clause does not relate—considering the second clause, according to a correct construction of it, to be more probably consistent with the testator's general views and general intention than the first-and considering also, that effect may be given to the second rather than to the first, consistently with the established rules of interpretation applicable to testamentary instruments, I decide, that the surplus rents, during the minority of Henry John Tower, do not belong to Georgiana Isabella Tower, nor are undisposed of, but are governed effectually and wholly by the second clause.

#### ARMYTAGE V. ARMYTAGE.

By an indenture of settlement, dated the 16th Novem- By a marriage ber, 1791, and made in contemplation of a marriage, which was shortly afterwards solemnized, between Sir George Armytage and Mary Bowles, reciting that Sir George Armytage was under his father's will tenant for life, with remainder to his first and other sons in tail male, of the manor and estates of Briestwell and Brighouse, with powers of jointuring and raising portions and maintenance for his daughters and younger sons, it was witnessed that given to substi-Sir George Armytage, in pursuance of the power for raising portions, and having already an eldest son by a former marriage, granted, limited, and appointed the said for raising those

1842. April 23rd. 26th. May 7th.

settlement of 1791, certain estates at B. were charged with a sum of £10,000 for portions for the children of the marriage, in equal shares ; and by the same instrument power was tute for those estates other estates of equal value, as a fund portions. By a deed of 1811, the settlor cove-

nanted that as soon as estates at H. were disincumbered, he would charge them, in substitution for the other estates, with the payment of £10,000 for portions, under the same limitations as had been expressed in the settlement, and would also further charge the same estates at H. with the sum of £30,000 for the younger children of the marriage, to be paid to them in such shares and proportions as he the settlor should by deed or will appoint. By a deed of 1816 (which was a general conveyance of all the settlor's estates in trust for payment of his debts), reciting amongst other things that the settlor had not then performed the covenant contained in the deed of 1811, it was declared that the trustee of that deed should hold the estates at H., or otherwise convey the same to the trustees of the settlement for the purpose of securing the portions according to the deed of 1811. And by a deed of 1816, reciting the former deeds, the trustees of the deed of trust, by the direction of the settlor, conveyed the estates at H. to the trustee of the settlement, upon trust, after the death of the settlor, to raise £10,000 in lieu and satisfaction of the £10,000 under the settlement, in trust for all and every the shildren of the marriage, under the same limitations as were contained in the settlement, and upon trust to raise the further sum of £30,000 for all and every the children of the marrisgs except the eldest son J., in the same manner in all respects, excluding the said J., as by the indenture of settlement was declared concerning the sum of £10,000 thereby directed to be raised :- Held, that the deed of 1817 was a complete execution of the power of appointing the £30,000 contained in the deed of 1811; and, consequently, that the younger children of the marriage who were living at the time of the execution of the deed of 1817 were entitled te the £30,000 in equal shares.

A father executed a power of appointment, under which his four younger children, B., C., D., and E., became entitled, subject to his life interest, to £30,000 in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C., and D., in the following shares; viz. to B. 13,0001., to C. 50001., and to D. 12,0001. E., who was a son, died in his father's lifetime intestate and without issue; whereupon his share devolved to the father. After E.'s decease the father, with a view to support the subsequent appointments, executed a deed-poll, declaring that the original appointment under which the children took equally was made by mistake :- Held, that though the subsequent appointments were invalid, so far as related to the shares of B., C., and D., yet as regarded the share of E., the father was bound by the statement in the deed-poll; and that E.'s share, amounting to £7,500 must be apportioned between B. and D., in satisfaction pro tanto of the losses which. through the invalidity of the subsequent appointments, had been sustained by their respective

shares.

ABHYTAGE ABHYTAGE

manors and estates, subject to his own life interest therein. unto Sir Abraham Elton and Richard Palmer, their executors, administrators, and assigns, for the term of 1000 years, upon the following trusts: that is to say, in case there should be one or more children of the marriage. upon trust that the said trustees, or the survivor of them, his executors, administrators, or assigns, should, within three calendar months after the decease of the said Sir George Armytage, or in his lifetime, if he should so think fit and so direct by any writing under his hand and seal, by sale or mortgage of the manors and premises comprised in the said term, or a competent part thereof, or out of the rents and profits thereof, levy and raise the sum of £10,000 for the portions of such children, to be equally divided amongst them, and if but one such child, for the portion of such only child; the portions to be payable to the sons at 21, and to the daughters at 21, or marriage, with a provision for survivorship, in the event of any dying under 21. By the same indenture, after reciting that Sir George Armytage was seised in fee of the rectory, glebe, tithes, and other estates at Mirfield and Liversedge, in the county of York, and also entitled to a reversionary sum of £5000, it was witnessed, that Sir George Armytage demised the last-mentioned real estates to the same trustees for a term of 2000 years, and assigned to them the £5000, upon trust, in case the said marriage should take effect, and the sum of £10,000 therein appointed to be raised could not from any causes be raised from the premises thereby charged with the payment thereof, then that the said trustees should, by sale or mortgage of the premises comprised in the term of 2000 years, or by the application of the £5000, levy and raise such sum and sums of money as should from time to time be adequate to any deficiency in the said portions, and therewith make good such deficiency. And it was by the said indenture further provided, that in case Sir George Armytage should well and

effectually charge any other messuages, lands, tenements, or hereditaments with the sum of £10,000, to be secured by the grant and demise of a term of years in trust for raising the same, for the portion and portions of all and every the children of the said then intended marriage, in like manner and with the same provisions for survivorship and maintenance as expressed and declared concerning the said sum of £10,000 thereinbefore directed to be raised by means of the said term of 1000 years, then and in that case, the before-mentioned grant and limitation of the said manor and premises, and the said terms of 1000 years and 2000 years, and all the trusts of the said terms respectively, should cease and be null and void; and the said sum of £5000 should be taken and received by, or re-assigned to, the said Sir George Armytage.

At the time of the execution of this indenture, Sir George Armytage had an only child by his first marriage; a son, who afterwards died in the lifetime of his father, an infant, and without issue. By his marriage with Mary Bowles, Sir George Armytage had six children, namely, John, Mary, Henry, Edward, Henrietta and Francis, all of whom, except Francis, lived to attain the age of 21 years.

By an indenture, dated the 23rd October, 1811, and made between Sir George Armytage of the one part, and Sir Abraham Elton of the other part, reciting the last-stated indenture, the solemnization of the marriage, the death of Richard Palmer, and that Sir George Armytage had, in pursuance of the power of sale contained in the indenture of settlement, and with the concurrence of Sir A. Elton, sold part of the hereditaments at Mirfield and Liversedge, comprised in the term of 2000 years; and reciting that Sir George Armytage was seised in his demesne as of fee of the manor or lord-ship of Clifton and Hartishead, in the said county of York, and divers messuages, farms, lands, and hereditaments then together of the yearly value of £5828 and upwards,

ARMYTAGE D.
ARMYTAGE.

ARMYTAGE 8.

13th November in that year, to which indentures Sir George Armytage and his eldest son John Armytage were parties, a recovery was suffered of the manors and estates of Brighouse and Briestwell to the use of Sir George Armytage in fee.

By an indenture of release, dated the 9th of March, 1816, and made between Sir George Armytage of the first part, John Armytage of the second part, and Francis Maude, John Lee, and Thomas Rishworth of the third part, reciting the before-mentioned indentures, and the recovery, and also reciting that the estates at Hartishead and Clifton stood charged with certain annuities and a mortgage, and that Sir George Armytage was also indebted to divers persons in various sums, which were intended to be specified in a certain account; and also reciting that Sir George Armytage had not then performed his covenant with Sir Abraham Elton, contained in the indenture of the 23rd of October, 1811, by charging the hereditaments in Clifton and Hartishead with the said two several sums of £10,000 and £30,000 for the portions of younger children; and that it was the wish and desire of Sir George Armytage to perform his said covenant so made with the said Sir Abraham Elton, and to secure the payment of all his debts and obligations to the utmost of his power, and subject thereto to make such settlement of his real estate as therein expressed and contained; and also reciting that Sir George Armytage had by indenture of assignment, bearing even date with the present indenture, assigned to the before-named trustees all his personal estate and effects, upon the trusts thereinafter mentioned; and also reciting, that it had been agreed between the said Sir George Armytage and John Armytage, that the whole of the real estates of the said Sir George Armytage, and the interest therein of the said John Armytage, should be conveyed to the said trustees, their heirs and assigns, upon the trusts thereinafter declared; it was witnessed, that the

said Sir George Armytage and John Armytage, according to their respective estates and interests therein granted, bargained, sold, aliened, released, limited, directed, appointed, ratified, and confirmed unto the said Francis Maude, John Lee, and Thomas Rishworth, their heirs and assigns, the estates at Hartishead and Clifton, Mirfield and Liversedge, Brighouse, Middletown, and Briestwell. with their respective appurtenances, and all other the real estates whatsoever of Sir George Armytage, in the county of York, to hold the same upon the trusts following; (that is to say), as, to, for and concerning the mansion-house called Kirklees Hall, and the park and demesne lands occupied therewith, and several other specified lands, being part of the estates in Clifton and Hartishead, upon trust that the said Francis Maude, John Lee, and Thomas Rishworth, and the survivors and survivor of them. and the heirs and assigns of such survivor, should stand and continue seised thereof, or otherwise should convey the same to the said Sir Abraham Elton, his heirs and assigns, in trust for securing, amongst other things, the payment of the said £10,000, for the portions of all the sons and daughters of the said Sir George Armytage by the said Dame Mary his wife, pursuant to the covenant of the said Sir George Armytage, contained in the before stated indenture of the 23rd October 1811, in manner and form, and under and subject to the several powers, provisoes, declarations and agreements, in the same indenture contained or expressed, or thereby referred to; and as to the residue of the estates at Clifton and Hartishead, upon trust that the said trustees should stand seised of the same, or otherwise convey the same to the said Sir Abraham Elton, his heirs and assigns, in trust, among other things, for securing the payment of the sum of £30,000 for the additional portions of the younger sons and daughters of the said Sir George Armytage, by the said Dame Mary Armytage his wife, in further pursuance of the covenant of the

ARMYTAGE

1842.
ARMYTAGE
9.
ARMYTAGE.

said Sir George Armytage, contained in the indenture of the 23rd of October 1811, in manner and form, and under and subject to the several powers, provisoes, declarations, and agreements, in the same indenture contained or expressed, or thereby referred to. And it was further declared and agreed, that subject, among other things, to the sums of £10,000 and £30,000 for portions as aforesaid, the said trustees should stand seised of all the hereditaments thereby granted, upon trust, without the consent of Sir George Armytage and John Armytage, or either of them, to sell or mortgage all or any part of the said hereditaments, and out of the monies produced by such sales to provide certain annuities for Sir George Armytage and his sons, and to pay the debts of Sir George Armytage, as mentioned in a schedule to the present indenture; and after making such payments, to convey the unsold estates to the following uses: (that is to say), the unsold estates at Brighouse, Mirfield, Liversedge, and Middletown, to the use of the said Sir George Armytage, his heirs and assigns for ever. And as to the remainder of the said trust estates, subject to the aforesaid sums of £10,000 and £30,000 for portions, to the use of Sir George Armytage and his assigns for life, with remainder to trustees to preserve the contingent remainders, with remainder to John Armytage for life, with divers remainders over, in strict settlement.

By an indenture dated the 18th of January, 1817, and made between Francis Maude, John Lee, and Thomas Rishworth, of the first part, Sir George Armytage, and Dame Mary his wife, of the second part, and Sir Abraham Elton, of the third part, after reciting the before-mentioned indentures and the recovery, and that Dame Mary Armytage and Sir Abraham Elton (who was her trustee) had consented to release the premises comprised in the indenture of settlement of the 16th November, 1791, from her jointure, upon the estates at Hartishead and Clifton being substituted as therein mentioned, the said Francis Maude,

John Lee, and Thomas Rishworth, at the request and by the direction of the said Sir George Armytage and Dame Mary his wife, testified as therein mentioned, (as far as he and they respectively lawfully could and might), granted, bargained, sold, demised, limited, and appointed, and the said Sir George Armytage ratified and confirmed unto the said Sir Abraham Elton, his executors, administrators, and assigns, all that the manor of Hartishead with Clifton, and the mansion-house at Kirklees, called Kirklees Hall, in Clifton aforesaid, and the park and demesne lands belonging thereto, and the several specified messuages and tenements in Hartishead and Clifton, and the tithes of Hartished with Clifton, with their appurtenances, for the term of 2000 years, commencing from the day of the death of the said Sir George Armytage, upon trust that he, the said Sir Abraham Elton, his executors, administrators, or assigns, should, within three calendar months next after the decease of the said Sir George Armytage, by all and every or any of the ways and means therein mentioned, levy and raise the sum of £10,000, as and for the portion of all and every the sons and daughters of the said Sir George Armytage, by the said Dame Mary his wife, in lieu of and satisfaction for the said sum of £10,000, in and by the said indenture of the 16th of November, 1791, directed to be raised in the manner therein mentioned, and to be paid to and vested in such sons and daughters, at such times and with such benefit of survivorship and accruer, in such and the same manner in all respects as the said sum of £10,000, or as near thereto as might be; and should in like manner levy and raise the further sum of £30,000 for all and every the sons and daughters of the said Sir George Armytage, by the said Dame Mary his wife, (except their eldest son, the said John Armytage), and to be paid to and vested in such sons and daughters, (except the said John Armytage), with such benefit of survivorship, (except as to the said John Armytage), and in

ARMYTAGE U.
ARMYTAGE.

1842.
ARMYTAGE

O.
ARMYTAGE.

such and the same manner in all respects, (excluding the said John Armytage), as by the said indenture of the 16th of November, 1791, was expressed or declared of or concerning the said sum of £10,000 thereby directed to be raised in the manner therein mentioned. The indenture then contained a release of the estates contained in the settlement of 1791 from Dame Mary Armytage's jointure, and an assignment of the jointure terms to the trustees.

By an indenture, dated the 10th May, 1819, reciting the indentures of October, 1811, and March, 1816, and that a marriage was in contemplation between Henry Armytage, the second son of Sir George Armytage, and Charlotte Le Gendre Starkie, Sir George Armytage, in consideration of natural affection to his son and for making a provision for the intended marriage, and in execution of the powers given him by the recited indentures, appointed £13,000, part of the said sum of £30,000, to Henry Armytage absolutely. This sum, subject to Sir George Armytage's life interest therein, was accordingly made the subject of settlement by indentures of June, 1819, which were executed shortly before the marriage.

In October, 1824, Sir George Armytage made a similar appointment of £5000, other part of the £30,000, in favour of his daughter Henrietta, on her marriage with Charles John Brandling; and that sum of £5000 was in like manner made the subject of settlement.

In 1830 Edward Armytage died intestate and unmarried. By a deed poll, dated the 31st of August, 1831, under the hands and seals of Francis Maude, John Lee, and Sir George Armytage, and purporting to be made, but not executed, by Sir Abraham Elton, and indorsed on the indenture of the 18th January, 1817, after reciting that in and by the last-mentioned indenture it was declared that Sir Abraham Elton, his executors, administrators, and assigns, should stand possessed of the term of 2000 years, upon trust (amongst other things) to levy and raise the

sum of £30,000 for all and every the sons and daughters of the said Sir George Armytage, by Dame Mary his wife, (except John Armytage, their eldest son), and to be paid to and vested in such sons and daughters, and with such benefit of survivorship and accruer, and in such and the same manner in all respects (excluding the said John Armytage) as by the said indenture of the 16th November, 1791, were expressed and declared concerning the sum of £10,000 thereby directed to be raised; and reciting that it was the intention of the parties to the indenture of the 18th January, 1817, that the said sum of £30,000 should be paid and applied upon the trusts expressed and declared or directed of or concerning the same, in and by the indenture of the 23rd October, 1811, and that it was by mistake that the indenture of the 16th of November, 1791, was mentioned or referred to in the declaration of trust in the within indenture, instead of the indenture of the 23rd October, 1811; and that it was the desire of the said parties thereto for giving effect to any appointment or appointments made by the said Sir George Armytage, and for all other purposes that the within indenture should be as effectual as if the trust thereby declared of the said £30,000 had been correctly declared; it was witnessed. that the said Sir Abraham Elton, his executors, administrators, and assigns, should stand possessed of the said sum of £30,000, so to be raised as aforesaid, upon the trusts in the said indenture of the 23rd of October, 1811, expressed and declared or referred to concerning the same, in such or the like manner as if it had been so expressed or declared by and in the within indenture.

By a deed poll of June, 1832, Sir George Armytage appointed £12,000, being the remainder of the £30,000, to his daughter Mary, the wife of William Ponsonby Johnson, who was then the only other younger child of Sir George Armytage.

John Armytage died in May, 1836, leaving the plaintiff,

1842.
ARMYTAGE

ARMYTAGE.

ARMYTAGE 0.
ARMYTAGE.

an infant, his eldest son and heir-at-law, and the defendant, Mary Armytage, his executrix.

Sir George Armytage died intestate in July, 1836, whereupon letters of administration of his personal estate were granted to Henry Armytage, who also became the administrator of his brother Edward.

The bill was filed for the purpose of obtaining the directions of the Court as to the disposal of the above-mentioned sum of £30,000; and the principal question at the hearing on further directions was, whether the deed of January, 1817, was a complete execution of the power reserved by the deed of October, 1811; for, if it was, then the appointments made by Sir George Armytage, subsequently to the deed of January, 1817, would, as to at least three-fourths of the fund, be void. As to the remaining fourth, a further question was raised, the purport of which will be seen from the arguments (a).

Mr. Swanston and Mr. James, for the plaintiff.

Mr. Walker for the defendants Mr. and Mrs. Johnson.—
The object of the deed of 1817 was merely to shift the property on which the portions were secured; not to execute any appointment of the property. The deed of October, 1811, contained a covenant by Sir George Armytage that, after the discharge of certain incumbrances on the Hartishead and Clifton estates, he would substitute those estates for the estates which were the subject of his marriage settlement. The object of the deed of 1817 was to carry that covenant into execution, but not to exercise or extinguish the power which had been reserved to him. The intention to substitute the fund, is clear from the recitals of that deed, particularly the recital relating to Lady Armytage's jointure. There was no occasion to execute the power; no marriage; no settlement to be made; no family pur-

pose to be answered. There is not sufficient legal evidence of any intention to execute it. It was introduced for the benefit of the family. Why extinguish it? Brookman v. Hales (a); Reith v. Seymour (b).

1842.
ARMYTAGE

ARMYTAGE

Mr. Headlam, for the defendant Henry Armytage, took the same line of argument.

Mr. Wigram and Mr. Roundell Palmer, for the defendants, Mr. and Mrs. Brandling, contended that the language of the deeds of 1816 and 1817 in the operative parts, if not in the recitals, shewed an intention to execute the power. They also noticed that the deed of 1832, by which the appointment was made in favour of Mr. and Mrs. Johnson, contained no reference to the deed of August, 1831—a circumstance which they insisted led to the inference that no such mistake as that which was mentioned in the deed of August, 1831, ever existed.

Mr. Simpkinson, for the defendant Mary Armytage.

Mr. Walker, in reply.

THE VICE-CHANCELLOR.—Thinking it, as I do, highly probable, that Sir George Armytage never intended to give up the power of distribution which he originally had in respect of the £30,000 (which was an addition to his younger children's portion, proceeding entirely from his own bounty), I have looked through the deed of 1817 with some anxiety to find, if I could, some demonstration of intention that that power should continue, or the means of interpreting the instrument consistently with the continuance of the power.

It appears that, in the year 1811, Sir George Armytage had covenanted, voluntarily as it seems, to charge certain

(a) 2 Ves. & B. 45.

(b) 4 Russ. 263.

VOL. I.

II

N. C. C.

1842.
ARMYTAGE
v.
ARMYTAGE.

estates "with the raising and payment, under the trusts of a term of years to be limited for that purpose, and to take effect on the decease of Sir George Armytage, of a sum of £30,000, for the additional portions of the son and sons, daughter and daughters of Sir George Armytage, by Dame Mary his wife, (other than and except an eldest or only son), to be raised and paid unto and for the benefit of such younger children, in such way and manner, and in such shares and proportions, and with such maintenance as Sir George Armytage should by deed or will appoint; and in default of such appointment, the same to be equally divided between such younger children, and then to become vested in them at the usual age or time, and with such benefit of survivorship, and with such maintenance as is usual in like cases;" the deed containing no reference to the trusts of the sum of £10,000, which by his marriage settlement had been provided for all these younger children, and with them a son excluded by this settlement, who at the time of this settlement had become an eldest son, which he was not originally.

It appears that in the year 1816, Sir George Armytage, with the view of providing for the performance of this covenant, vested certain estates in trustees, upon trust to raise the sum of £30,000 for the purposes for which it was directed to be raised by this deed.

The difficulty, however, arises upon the deed of 1817. In the very following year, 1817, a new arrangement being to be made, the £30,000 being to be provided for in another way, the raising of the sum of £30,000 is provided for, not in the language which only in the previous year had been used, but in language strongly and pointedly departing from it, namely, according to this tenor; after providing for raising a sum of money for another purpose, it proceeds thus: "And upon further trust, that he, Sir Abraham Elton, his executors, administrators, and assigns, shall, within three calendar months after the decease

of Sir George Armytage, in manner therein mentioned, levy and raise the sum of £10,000, as and for the portion of all and every the sons and daughters of Sir George Armytage. by Dame Mary his wife, in lieu and in satisfaction of the sum of £10,000, in and by the indenture of the 16th day of November, 1791, directed to be raised in the manner therein mentioned, and to be paid to and vested in such sons and daughters, at such times and with such benefit of survivorship and accruer, and in such and the like manner in all respects as the said sum of £10,000, or as near thereto as may be." Then it goes on thus,-"And shall also in like manner levy and raise the further sum of £30,000 for all and every the sons and daughters of the said Sir George Armytage, by the said Dame Mary his wife, except their eldest son, the said John Armytage" (the father of the plaintiff), "and to be vested in such sons and daughters, except the said John Armytage, with such benefit of survivorship, and in such and the same manner in all respects, excluding the said John Armytage"---now you would expect to find the deed of 1811 referred to with respect to this sum of £30,000, as the deed of 1791 had been referred to with respect to the £10,000, but no; the language is totally changed,-it stands thus-" as by the indenture of the 16th of November, 1791, was expressed and declared of and concerning the sum of £10,000 thereby directed to be raised in manner therein mentioned."

It seems difficult to think that this could have been by mere mistake; there is no evidence of any mistake. Certainly there is no intention apparent from the language of the deed to execute the power. The only intention that I can find expressed in recital or narrative, is an intention to charge the £30,000. However, I find in words too plain to be mistaken, if they are to stand, as they must stand, as part of the deed, that the £30,000 are to be paid to the persons who are entitled to the £10,000, and in the same

ARMYTAGE O.
ARMYTAGE.

ARMYTAGE O. ARMYTAGE manner as the £10,000. Now that is a mode of directing the payment of the £30,000 consistent with the covenant in all respects, but not consistent with the continuance of the power. Therefore, although I should have been at least as well satisfied, if I could have found in this deed anything which in my judgment could warrant me in holding that the power continued, and although I cannot help suspecting that this matter was not brought to the mind of the party, I am afraid that the language is too strong to be overcome; and I must therefore (though not very willingly) hold that the power is in effect exercised, and in effect exhausted by this instrument.

After the foregoing judgment had been delivered, Mr. Walker suggested, that, as the effect of it would be to distribute the £30,000 equally between the four children of Sir George Armytage, who were living in 1817, and as by the death of Edward Armytage in his father's lifetime his share became the property of his father, the Court would, to the extent of that share, give effect to the appointments to Henry Armytage and Mrs. Brandling; the deed of August, 1831, operating by estoppel to prevent the father from alleging that such was not the operation of those appointments.

Mr. Headlam suggested, that, upon the point now made, there was a distinction between the equities of Colonel Armytage and Mrs. Johnson; the appointment to the former having been made anterior to, and in contemplation of, his marriage, while the appointment to Mrs. Johnson was made subsequently to her marriage, and after the mistake had been found out.

THE VICE-CHANCELLOR said, that the intention expressed by the deed of August, 1831, as to the £30,000, might be

argued to be one and entire, and it might be difficult to give effect to a part only of the intention so expressed. His Honor, however, reserved his decision on the point.

ARMYTAGE

On a subsequent day, the *Vice-Chancellor* said, that having reconsidered the subject, he was of opinion that the appointments made by Sir George Armytage were good, to the extent of Edward Armytage's share.

May 71h.

Declare that the shares and interests of the vounger children of the late Sir George Armytage, and Mary his wife, in the pleadings respectively mentioned, of and in the said portion or sum of £30,000 mentioned in the pleadings and in the several indentures and deeds of the 23rd October, 1811, the 9th March, 1816, the 18th January, 1817, the 10th May, 1819, the 30th October, 1824, the 31st August, 1831, and the 18th June, 1832, respectively in the said pleadings mentioned, were appointed and determined by the declaration or limitation in that behalf contained in the said indenture of the 18th January, 1817; and that, under the circumstances, the said late Edward Armytage, and the defendant Henry Armytage, Henrietta Brandling, and Mary Johnson, respectively became entitled to vested interests in the said sum of £30,000, in equal fourth parts or shares. And that the several appointments, in the said pleadings mentioned, by the late Sir George Armytage, of the several sums of £13,000, £5,000, and £12,000, making in all £30,000, by the said deeds of the 10th May, 1819, the 30th October, 1824, and the 18th June, 1832, were of no effect, as appointments of, or as disposing of the said sum of £30,000, or any part thereof, save as next hereinafter mentioned; and it appearing by the said Master's report that the said late Edward Armytage died intestate, and without having been married, and that his father the late Sir George Armytage survived him, and he being therefore entitled to the personal estate of the said Edward Armytage; and it also appearing, and having been acknowledged by the late Sir George Armytage by the hereinbefore mentioned deed poll of the 31st August, 1831, that the indenture or deed of the 18th day of January, 1817, was executed by him under such circumstances of mistake as in the said last-mentioned deed poll are mentioned, and it being admitted by the said defendant Henry Armytage, the administrator of the said Edward Armytage, that the debts of the said Edward Armytage have been paid, declare that the one-fourth part or share, or sum of £7500, to which the said Edward Armytage became entitled in the said portion or sum of £30,000, became under the appointments executed by the said late Sir George Armytage in favour of the said defendants Henry Armytage and Mary Johnson, by the deeds of the 10th May, 1819, and the 18th June,

ARMYTAGE

1832, and was divisible between the said Henry Armytage and Mary Johnson, together with their original fourth parts or shares in the said sum of £30,000, and that the same ought to be divided in the proportions following; (that is to say), the said Henry Armytage was, and the trustees of the articles executed on his marriage are now entitled to £11,700, as the share and interest of the said Henry Armytage of and in the said sum of £30,000, and the said Mary Johnson was and is entitled to £10,800 as her share and interest of and in the said sum of £30,000.

April 25th.

Testator bequeathed the sum of £4000 capital stock in the £3 per cent. Consols, or in whatever of the government funds the same should be found invested :-Held, that this was a specific legacy; and that the executor having paid one dividend on the stock, which became due within a year after the testator's death to the residuary legatee, must refund to the specific legatee.

Extra costs occasioned by an infant being made a defendant, who ought to have been made a plaintiff, not allowed.

## Hosking v. Nicholls.

THOMAS HOSKING, by his will, gave and devised unto John Button, Joseph Nicholls, Philip Marack, and William E. Nicholls, their executors, administrators, and assigns, the sum of £4000 capital stock in the £3 per cent. Consolidated Bank Annuities, or in whatever of the government funds the same should be found invested, upon trust that they, the before-named persons, their executors, administrators, and assigns, should assign and transfer the said capital stock of £4000 unto and amongst such of the sons of his, the testator's, cousins, Thomas Hosking and John Hosking, as should be living at the time of his decease, in equal shares and proportions, share and share alike. And the testator appointed the said John Button, Joseph Nicholls, Philip Marack, and William E. Nicholls, executors in trust of that his will.

At the time of the testator's death there was standing in his name in the £3 per cent. Consols, a sum of £4100 stock; but the testator having made no disposition of any of the stock beyond £4000, the defendant, William E. Nicholls, who was the only acting executor, transferred the surplus £100 stock to the testator's residuary legatees. He also paid to the same legatees the first half-year's dividend which accrued due after the testator's death on the

£4000 stock, upon the supposition that the bequest of that stock was general. He paid to two of the children of John Hosking, who were of age, their shares of the £4000 stock. Of the remaining stock he sold out £1400 in March and September, 1840, with a view, as he alleged, of investing it so as to obtain a higher rate of interest.

Hosking v.

The bill was filed by the infant children of Thomas Hosking against William E. Nicholls and the infant child of John Hosking, praying to have the remaining shares of the £4000 stock secured for the benefit of the infant legatees, and seeking to charge the defendant Nicholls with £5 per cent. interest on the balances from time to time remaining in his hands in respect of the capital stock sold out.

The principal question raised at the hearing was, whether the bequest of the £4000 stock was general or specific. In the latter case, the legatees of the stock would be entitled to the dividends from the testator's death.

Mr. Simpkinson and Mr. Hurd for the plaintiffs, in reference to the words, " or in whatever of the government funds," &c., cited Fontaine v. Tyler (a), and Ashton v. Ashton (b), and observed that Parrott v. Worsfold (c) was overruled by Bethune v. Kennedy (d). [The Vice-Chancellor.— The argument may be that this is no more than a demonstrative legacy.] We submit that the testator meant the identical stock which he had in his name.—[The Vice-Chancellor.—If this had been intended as a general legacy, the direction might probably have been to the trustees to purchase; here it is to assign and transfer.]

Mr. Cooper and Mr. Sheffield for the defendant Nicholls.—If the testator had had no government funds and no other stock, the legacy would have been purchasable out of the general personal estate. The testator merely be-

<sup>(</sup>a) 9 Price, 94

<sup>(</sup>c) 1 J. & W. 594,

<sup>(</sup>b) Ca. t. Talb. 152.

<sup>(</sup>d) 1 Myl. & Cr. 114.

Hosking v.
Nicholls.

queathed the fund to purchase the consols. Parrott v. Worsfold was not cited in Bethune v. Kennedy.

Mr. Rolt for the infant defendant.

THE VICE-CHANCELLOB.—If the testator had meant to give a general legacy he would probably have said no more than that he gave £4000 Consols: but he does more than that; he bequeaths £4000 stock in the £3 per cent. Consols, " or in whatever of the government funds the same shall be found invested." The question is, whether this legacy is merely demonstrative or specific. It has always been held that a legacy of stock out of stock is specific, being the gift of part of a specific fund. Here the testator intimates an intention that the stock shall be taken. not out of his general personal estate, but out of whatever government fund he may possess; therefore, only government funds are to be resorted to. It is not a bequest of money out of stock, but stock out of stock (a). It is a specific bequest, and the executor must pay the dividends from the death of the testator. With respect to the balances in his hands, as he does not appear to have acted with any bad intention, let him be charged with interest at £4 per cent.

Upon an application being made for the costs of the infant defendant, the *Vice-Chancellor* said that he would not compel the executor to pay two sets of costs. He must pay the plaintiffs their costs; but those of the infant defendant, beyond what he would have incurred if he had been made plaintiff, must be paid out of the fund, as there was no reason for his not having been made a plaintiff.

<sup>(</sup>a) As to this distinction, see Kirby v. Potter, 4 Ves. 478. See also as instances of specific legacies out of stock, Morley v. Bird, 3 Ves.

<sup>628;</sup> Drinkwater v. Falconer, 2 Ves. sen. 623; Sleech v. Thorrington, Id. 560.

## THERRY V. HENDERSON.

JAMES COTTER, by his will, directed his executors to where pending reserve out of his personal estate a sum of £1000, £3 per cent. Consols., and to pay the dividends thereof to his old and faithful servant, Bridget Cosgrave, for her life, and after her decease to her son John, who was likewise the testator's servant, for his life; and after the death of the survivor of them, the testator directed that the said sum of parties to the £1000 Consols should sink into the residue of his personal suitought toap-The testator also by his will, and by a codicil, directed his executors to reserve out of his personal estate £4500, £3 per cent. Consols., and to pay and apply the whole or such part of the dividends thereof as they in their discretion should think proper, in or towards the maintenance and education of James, the natural son of Mary former. Cosgrave, until he should attain the age of 21 years, and should lay out and invest the surplus, if any, of such dividends in the government funds, as an accumulating fund, for the benefit of the said James, or such persons as might become entitled thereto; and so soon as the said James Cosgrave should attain 21, the stock, with all accumulations, was to be transferred to him; but in case he should die under 21, it was to sink into the residue. Power was given to the trustees to advance a sum not exceeding £200 out of James Cosgrave's legacy, for putting him out as an apprentice. All the legacies were, by the direction of the testator, to be paid within six months after his decease.

The testator died in August, 1839, and in the following month his will was proved by his executors. In November, 1840, a bill was filed by the residuary legatees against the executors for the general administration of the testa-That suit, "Therry v. Henderson," came on tor's estate. for hearing before the Vice-Chancellor of England on the 23rd July, 1841, when a decree was pronounced directing April 26th.

an administration suit, a suit is instituted by legatees praying no further relief than might be had in the administration suit, the administration ply to have the proceedings in the legatees' suit staved : otherwise the costs of the latter suit may be dealt with as costs in the

1842. THERRY 9. Henderson. the usual accounts. Under an order in that suit, dated on the 8th of the same month of July, certain sums had been paid into Court by the executors, which when laid out produced the sum of £7253 Consols.

Delay having been occasioned by these proceedings in payment of the legacies to the Cosgraves, a bill was filed on the 26th July, 1841, (three days after the decree in "Therry v. Henderson") by Bridget Cosgrave, John Cosgrave, and James Cosgrave, who was an infant, by Bridget Cosgrave, his next friend, against the executors and residuary legatees, praying an account and payment of what was due for interest and dividends on the legacies of £1000 and £4500 Consols; that such legacies might be duly secured; that out of the dividends of James Cosgrave's legacy a proper allowance might be made for his maintenance; that the residue of such dividends might be accumulated for his benefit; and that a proper person might be appointed guardian of his person and estate.

The answer of the residuary legatees to the last-mentioned bill contained a statement, which was corroborated by the answers of the executors, to the following effect: viz. that the defendants believed that in and previously to the month of April, 1841, the plaintiffs, the Cosgraves, had full and distinct notice of the suit of "Therry v. Henderson," and that the object thereof was to obtain a complete administration of the testator's estate; and, moreover, that the plaintiffs were at that time informed by the solicitors acting for the testator's executors and residuary legatees, that such solicitors would afford every information that might be required by the plaintiffs, or their solicitor, in relation to the suit of "Therry v. Henderson," or the proceedings thereunder. The defendants therefore submitted for these reasons, and inasmuch as the plaintiffs' bill was filed subsequently to the decree being pronounced in the cause of "Therry v. Henderson," and no further or additional relief was sought by the plaintiffs' bill than might

have been obtained by the plaintiffs in the suit instituted by them, that the costs of that suit ought to be paid personally by the plaintiffs, or should be deducted from the interest of the funds to which the plaintiffs were exclusively entitled.

1842.
THERRY
v.
HENDERSON.

The two causes now came on for hearing; the former on further directions, and the latter generally.

Mr. Cooper and Mr. Pitman, for the residuary legatees, submitted that the latter suit was unnecessary, and that the plaintiffs in that suit should pay the costs of it personally.

Mr. Romilly, for the executors, observed, that his clients had given due notice of the administration suit to the plaintiffs in the second suit, and that the second suit was unnecessary, inasmuch as a guardian and maintenance could have been obtained on petition.

Mr. Walker and Mr. Montague, for the plaintiffs in the second suit.—The plaintiffs, the Cosgraves, are persons in humble life, and have been kept out of the receipt of the dividends for two years. As to James Cosgrave, the testator directed, that, after a proper sum had been applied for his maintenance, the rest of the dividends should accumulate. James Cosgrave is entitled to have that money laid out for his benefit. He could not have that relief nor maintenance in "Therry v. Henderson." All the Cosgraves are entitled to have the funds secured in a suit to which they are parties. They were no parties to the first suit. The notice given to them was not notice of a decree, but only of the existence of a suit.

THE VICE-CHANCELLOB.—To some extent, more or less, each party has been in the wrong. As soon as the bill in "Cosgrave v. Henderson" was filed, the executors or the

1842. THERRY HENDERSON.

residuary legatees ought to have applied to stay the proceedings in that suit; they ought not to have let it come to a hearing: on the other hand, the Cosgraves ought not to have proceeded after they had notice of the former suit. Let the costs of the suit of "Cosgrave v. Henderson," up to the time of putting in the last answer in that suit, be paid as costs in "Therry v. Henderson." But let the costs in "Cosgrave v. Henderson," after the last answer was put in, be paid out of the capital of the Cosgraves' legacies, in proportion to their respective amounts. Let an inquiry be directed as to maintenance.

July 11th.

Where two suits involve the same subjectmatter and the same parties, and a decree is made in one of will in some instances direct the hearing of the other suit to stand over. until that in which the decree is made is heard on further directions.

# CUMMING v. SLATER.

By a deed of 1804, certain estates were vested in trustees upon trust to sell and hold the proceeds, as to one-third, for the benefit of Mr. Spencer and his children, as to one-third for the benefit of Mrs. Fraser and her children, and as to them, the Court the other one-third, for Mrs. Bell and her children: with certain cross trusts, and with powers for Mrs. Fraser and Mrs. Bell, in the case of their dving without children, to appoint parts of their shares to their husbands. events happened, and the shares were appointed accordingly. This suit was instituted by the personal representatives of Fraser, the husband, for an account of the trust funds, and those funds were paid into Court in this suit. After the institution of this suit, a suit of "Westwood v. Slater," was instituted; Westwood claiming under Bell, the husband. All the parties under the trust were parties to both suits. "Westwood v. Slater" was first brought to hearing, and a decree for accounts and inquiries made.

On this cause coming on,

Mr. Swanston and Mr. Chandless pressed to have a decree in this suit, suggesting, that, in the suit of "Westwood v. Slater." enquiries were taken with a view to relieve the accounting parties, and that it was not, like this, a hostile suit.

1842. CHMMING SLATER.

THE VICE-CHANCELLOR, after enquiring whether there was any case raised in the pleadings of this cause which could not be reached by the enquiries in "Westwood v. Slater," refused to make any decree, the plaintiff in this suit being by the decree an acting party in "Westwood v. Slater:" and His Honor directed this cause to stand over and come on with the cause of "Westwood v. Slater," upon the hearing of that cause on further directions.

Lu mot com

# GODFREY v. MAW.

GODFREY and Wharton were trustees of the marriage Although difsettlement of Mr. and Mrs. Maw, which instrument con- ferent suits may involve the tained a covenant for the settlement of any after-acquired same subject-By the death of Mrs. Maw's brother, Cornelius the same par-Peacock, she succeeded as his administratrix and next of kin will not decline to certain personal property, and as his heir-at-law to certain to make a sereal property, both which classes of property (subject to the each suit, unless debts of Cornelius Peacock) were within the covenant con-two suits and tained in the settlement. A suit of "Axe v. Maw" was instituted by a creditor of Cornelius Peacock, and in that parties to each suit the usual decree was made for an account of the personal estate and of the real estate of Cornelius Peacock. After the institution of "Axe v. Maw," this suit was instituted by Godfrey and Wharton, the trustees of the settlement, against Mr. and Mrs. Maw, praying accounts of the personal and real estate of Cornelius Peacock, and a settlement pursuant to the covenants.

Nov. 11th.

matter and parate decree in the frame of the the relative position of the be the same.

1842.

On the cause coming on,

Godfrey v. Maw.

Mr. Cooper, for the plaintiff, asked for the accounts of the real and personal estate.

Mr. Wigram, for the defendant, contended that as Godfrey and Wharton and Mr. and Mrs. Maw were all parties to the suit of "Axe v. Maw," and all the enquiries asked in this suit were included in the decree made in "Axe v. Maw," the same course was to be adopted in this case as was taken in Westwood v. Slater (a).

THE VICE-CHANCELLOR said, that in the case of West-wood v. Slater, the frame of the two suits and the relative position of the two parties in each was the same. But in the present case the frame of the second suit and the position of the plaintiffs was different from the frame of the suit in "Axe v. Maw," and the position of the plaintiff in that suit, and that a second decree ought to be made.

The decree in this suit was accordingly made, directing the usual accounts of the personal and real estate of Cornelius Peacock, with liberty for the Master to adopt in this suit the proceedings already had in Axe v. Maw; and directing that, upon Axe consenting, both decrees should be prosecuted together, and one report to be made in both suits.

(a) See ante, p. 484.

#### SYMONS v. JAMES.

May 3rd.

By an order made in this cause on further directions, it Facts stated in was ordered, that the manor or lordship of East Brent, sale as the late the property of the testator, George Symons, and also ground of the the East Brent estate, and all other the testator's freehold, must be proved. copyhold, and leasehold estates, (except certain specified messuages), should be sold, with the approbation of the Master.

conditions

The property was accordingly put up to sale in lots; and with respect to lot 24, the fifteenth condition of sale was as follows:--

"15. That as lot 24 consists of a variety of allotments which were awarded in the year 1784 to Robert Macreath, Esquire, or his tenants, in respect of the manor, or some part or parts of the manor of East Brent, or of the lands held therewith, of which he was then the owner, which manor, together with such allotments and all lands held therewith, was subsequently purchased by the said George Symons: the title of the vendors to the said manor shall be conclusive evidence of their title to the said lot 24, and the vendors shall not be required to identify such lot with any part of the lands held with the manor, and conveyed to the said George Symons with the manor."

The lot was sold, and an abstract of title was delivered by the vendors to the purchaser, which was headed thus: "An abstract of the title of the devisees of George Symons, Esq., to four closes of freehold land, situate in Mark Moor, in the parish of Mark, in the county of Somerset, consisting of allotments No. 587 to 609, (both inclusive), on the Mark Moor Inclosure Award Plan, and being lot 24 in the particulars of sale."

The abstract set forth statements of the following documents:—An award of Commissioners under the Mark Moor 1842. Symons v. James

Inclosure Act, dated 2nd September, 1784, whereby 23 allotments of land in Mark Moor were awarded to Robert Macreath, in respect of the manor of East Brent; -indentures of lease and release of the 23rd and 24th December. 1791, by which Macreath conveyed to Dawes, in fee, the manor of East Brent, with its rights, members, and appurtenances; the particulars of the manor, with its appurtenances, including the 28 allotments, being mentioned in a schedule annexed to the release;—and then indentures of lease and release, dated the 28th and 29th September, 1792, by which, after reciting, that, by the before mentioned indentures of December, 1791, all and singular the manor of East Brent, and the other lands and hereditaments therein mentioned and intended to be thereby conveyed, had been, amongst other lands and hereditaments, conveyed to Dawes and his heirs; it was witnessed, that the said Dawes granted, bargained, sold, released, &c., to Symons and his heirs, all that the manor of East Brent, with its rights, incumbrances, and appurtenances, and all and every messuages, cottages, lands, tenements, and hereditaments, situate in East Brent, &c., and which were particularly mentioned in the schedule thereunto annexed, and all commons, common of pasture, &c. (the general words of the deed being very extensive); and then followed a schedule, which varied in several particulars from the schedule to the deeds of 1791, containing, in express terms, only 18 of the allotments made to Macreath.

Upon this evidence the purchaser insisted that a good title had been shewn to 18 only of the 23 allotments which constituted lot 24; and the Master having reported in favour of the title to the whole lot, subject to a question as to an alleged deficiency of quantity in one of the closes, the purchaser took an exception to his report, which exception now came on for argument (a).

<sup>(</sup>a) This case was twice argued.
On the first argument (which took

Chancellor having noticed the words

It was admitted that a good title had been made to the manor.

BYMONS 7. JAMES.

Mr. Keene, for the exception.

Mr. Malins for the report.—The circumstance that all the 23 allotments are not mentioned in the conveyance to Symons, is not a ground of objection to the title, when the terms of the 15th condition of sale are considered. Dawes may have changed the boundaries of the land, and the probability is, that in the conveyance to Symons, those only of the allotments which remained as they were allotted, are described.—[The Vice-Chancellor. It is highly probable, that all this property was enjoyed by Symons and those claiming under him. That would be very much in your favour, if you could show it.]—As the case stands. it is not conclusive against us, that the remaining four allotments may not have been included in the other allot-If so, the 15th condition of sale applies. ments.

"amongst other lands and hereditaments," contained in the recital in the conveyance to Symonds, inquired whether the schedule in that conveyance and the schedule in the previous conveyance to Dawes were identical. Upon being answered in the affirmative, His Honor, relying on that fact, expressed his opinion to be, that taking the title as it stood and the condition together, the burden was thrown upon the purchaser, to shew that there was no title to the four allotments in question; that on the face of the abstract there was, at least, a reasonable possibility of title; and that in the absence of any evidence to the contrary, and considering the terms of the condition of sale, the title must be taken to be good. His Honor therefore overruled the exception.

On this occasion the counsel for the purchaser contended that the vendor had waived the benefit of the 15th condition of sale, by delivering an abstract, stating the particular lands; and at all events that the condition was to be construed most strongly against him: Southby v. Hutt, 2 M. & C. 207.

With respect to the alleged deficiency in the quantity of land (which in the particulars of sale was stated to contain a certain number of acres "by estimation"), the counsel for the vendors cited Winch v. Winchester, 1 Ves. & B. 375; and Hill v. Buckley, 17 Ves. 394.

In appearing afterwards upon an examination of the schedules that they were not identical, the exception was reheard, as stated in the text. SYMONS 5. JAMES. only matter in dispute between the parties is, whether these lands were purchased with the manor. But by the 15th condition of sale we are not required to identify any of these lands with the lands held with the manor, and conveyed to Symons. The condition states, as matter of fact, that the lands are held with the manor, but stipulates, that the vendors shall not identify them with the lands so held; that is to say, the vendors are not to be called upon to prove their assertion of identity. The purchaser, however, says, 18 only of your allotments are mentioned in the conveyance, therefore you do not show the identity of the lands as held of the manor, and conveyed to Symons. But it is against that argument that the vendors have guarded themselves by the 15th condition of sale.

THE VICE-CHANCELLOR.—If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear, and unambiguous. And if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think, that the construction must be that which is rather favourable to the purchaser than to the vendor.

Now I agree that there is considerable plausibility in the argument which Mr. Malins has used, but it is not entirely convincing to my mind, that he has discharged himself from that obligation, which, in my view of the case, is incumbent upon a vendor, in circumstances of this description. The 15th condition of sale, as a reason for imposing certain terms upon a purchaser, makes two assertions of fact. Whether the purchaser is, or is not, to be bound by the condition, must depend upon the accuracy of those two assertions in point of fact. The first assertion is, "that lot 24 consists of a variety of allotments which were awarded in the year 1784, to Robert Macreath, Esq., or his tenants, in respect of the manor," and so on. The second assertion is, "that the manor, together with such allotments and all lands held therewith, was subsequently

purchased by George Symons." Now, it appears to me, that it is incumbent upon the purchaser to give evidence of those two matters of fact, and that to hold, that by reason of the condition following those assertions, the vendor is relieved from proving them, would not be fair or reasonable as between vendor and purchaser.

SYMONS
U.
JAMES.

It appears that a gentleman of the name of Dawes purchased the manor and lands from Mr. Macreath, and within less than a year afterwards, sold what now (a) appears to have been only part of the property to Mr. Symons. I apprehend, however, that any ordinary reader of this 15th condition of sale would read it as importing that whatever Macreath had went to Symons. Perhaps it is not the necessary and unavoidable consequence of the language used, but it appears to me, as I have already said, that any ordinary reader would consider this as representing that what Macreath had went to Symons. That, however, is not so, for it now appears that much of what Macreath had did not go to Symons.

I apprehend, that, according to every rule which ought to guide a Court in deciding a question of this description between vendor and purchaser, I must hold, that the purchaser is entitled to more evidence than he has hitherto received. It may be that evidence of uniform enjoyment of this lot 24 by Mr. Symons and his family under this title will satisfy me of the required fact; but at present there is no such evidence. I shall not, upon the present occasion, either allow or overrule the exception, nor shall I part with the deposit, but I shall refer it back to the Master to review his report; and in reviewing his report let the Master inquire whether the landscontained in lot 24 were comprehended in the conveyance from Dawes to George Symons. And let the Master have regard to any evidence which may be laid before him as to the enjoyment of lot 24 since the year 1792.

(a) See ante, p. 488, note (a).

1842.

April 21st.
Where one of two trustees of real estate decilines to act, the Court will appoint a receiver on behalf of infant cestus que trustes; but with liberty to either of the trustees to offer himself.

## TAIT v. JENKINS.

MR. TENNANT, on behalf of infant cestui que trusts, moved for a receiver of the rents and profits of the trust estate. There were two trustees, one of whom never acted and declined to receive. The other was desirous of doing so.

Mr. James Parker, for the acting trustee, opposed the motion.

THE VICE-CHANCELLOR ordered a receiver, with liberty to either of the trustees to offer himself (a).

(a) See Browell v. Reed, 1 Hare, 434.

May 6th.

Residuary personal property held to be vested in A. and B. in equal moieties, and descendible in the same proportions to their respective children, notwithstanding words giving the property to the survivor " in the event of the death of either:" the word " death" being held to refer to death in the testator's lifetime.

## CLARKE v. LUBBOCK.

CAPTAIN GEORGE CLANCY, by his will, after bequeathing certain legacies, and appointing four persons his executors, bequeathed as follows:—"The remainder of my property I may die possessed of, I leave to my late father's two natural children, to be placed in the British funds, and the interest accruing therefrom to be equally divided and paid to them for their support; but in the event of the death of either, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, I direct my property to be equally divided amongst my friends, my executors, or their children."

The testator's father left two natural children, John and Sophia; who both survived the testator. John Clancy married Harriet Browne, and died November, 1838, leaving issue an only child, Caroline, who at the time of the present hearing was a minor. Sophia Clancy married Mr. Clarke, and had issue three children, two of whom died without issue, in her life-time. Sophia died in February, 1839, having survived her husband, and upon her death,

her surviving child, John, took out letters of administration of her personal estate, and also of the personal estate of her deceased children. CLARKE V.

The bill was filed by John Clarke against the executors, and against Harriet and Caroline Clancy, praying a declaration of the rights of the parties.

The cause coming on for hearing on further directions—

Mr. Burge, (with whom was Mr. Hetherington), for the plaintiff, said that the question was whether the whole of the residuary property belonged to Sophia Clarke, as the survivor of the two natural children, absolutely, so that the plaintiff, as her personal representative, was entitled to take the whole, or whether it was to be divided equally between the plaintiff and Caroline Clancy. Assuming that the gift of the interest carried the capital, the ground for holding the plaintiff solely entitled would be this—that the survivor having taken the whole, the gift was to be divested only in the event of there being no children of either, which event had not occurred. On the other hand, exparte Rogers (a) was an authority for the construction that the two natural children took in equal moieties.

Mr. Russell and Mr. Keene, for the defendants.

THE VICE-CHANCELLOR.—In the first place, I think that the form of the decree binds me as to the next of kin of the testator. The Court, in framing the decree, must have thought that the next of kin had no interest; and if I am at liberty to form an opinion upon it, I should say that they had no interest.

In the events which have happened, that is to say, both the children having survived the testator, and both the children having left children, I am of opinion that one child, or the issue of one child, can claim no more than a moiety.

(a) 2 Mad. 449.

CLARKE v.

Declare one moiety to belong to the plaintiff; the other moiety to the defendants, Harriet Clancy and Caroline Clancy, or one of them. Let it be carried to an account to be intitled &c. Let the dividends be paid to Harriet Clancy till farther order, she undertaking properly to educate and maintain the defendant Caroline; without prejudice to any question between the defendants Harriet and Caroline. Liberty to apply.

May 7th, 9th, 24th.

Testator, pos-sessed of personal property only, by his will directed that the interest on his property should be divided into four equal shares: one share to be given to his wife for life, and then to devolve to his children and the longest liver in equal shares; the remaining three shares to be divided equally between his three children and their heirs; " should all my children die without heirs, my property in that case to be divided equally between the children of my brothers and sisters alive on the death of my last child." At the date of the will no brother or sister of the testator had died leaving issue : - Quære, whether the

## GARRATT v. COCKERELL.

DAVID BURGES, formerly a senior merchant in the civil service of the East India Company, made his will dated the 14th September, 1809, in the following terms:-"Having no regular form of a will by me, I leave the following as my last will and testament. The whole of my property that the bounty of Heaven hath indulged me with, is to be put out to interest in Government paper, either in India or in Europe, as my executors may find most advantageous to the estate. The interest on this property is to be divided into four equal shares; one share of this interest to be given to my wife, Mrs. Ann Burges, during her natural life, and then to devolve to my children, and the longest liver, in equal shares; the remaining three shares to be divided equally between my three children, and the longest liver, and their heirs. Should all my children die without heirs, my property in that case to be divided equally between the children of my brothers and sisters alive on the death of my last child. I leave to Lady M. S. Burges, my brother Ynyr Burges, Mrs. Burges's brother—Colonel Daniel Francis Blommart, and to Major George Fleming, the husband of my sister Margaret, and to each of my sisters alive at the time of my death, also to Mrs. Henry Burges, £100 sterling each for mourning rings. I leave my brother Ynyr Burges, Messrs. Palmer & Co.'s house

limitation over in the event of all the testator's children dying without heirs is void.

in Calcutta, the house of Messrs. Paxton & Co., of London, and Mrs. Burges's brother—Colonel Daniel Francis Blommart, to be executors of this my last will and testament."

GARRATT

U.

COCKERRLA

The will was not attested so as to pass real property, nor had the testator, at the time of making his will, or at his death, any real property; but he died possessed of a considerable personal estate.

At the date of the will no brother or sister of the testator had died leaving issue. The testator left surviving him his wife, Ann Burges, and two children only, namely Charlotte and David, the third child Amelia having died in his lifetime, unmarried. Ann Burges died in 1835.

David Burges, the son, having survived his sister Charlotte, who died intestate and unmarried, filed his bill in this Court in June, 1836, against the executors of the testator and against the children of the testator's brothers and sisters, praying, that he might be declared entitled to the whole of the residue of the testator's estate. That cause came on for hearing before the *Master of the Rells* in June, 1837, when a decree was pronounced for the plaintiff in the suit.

David Burges, the son, died in 1838, intestate and without issue.

In 1840, the present bill was filed by John Garratt and Elizabeth, his wife, who was a daughter of one of the testator's sisters and a defendant in the former suit, praying a declaration, that the children of the testator's brothers and sisters living at the death of David Burges, the son, were, in the events which had happened, beneficially entitled to the testator's residuary estate; that the personal representatives of the testator and of David Burges, the son, might be decreed personally to pay such residue to the parties thereto; and that, if necessary, the decree made by the Master of the Rolls might be reversed.

The present bill was filed against the executors of the

GARRATT D.

testator, the administrator of David Burges, the son, and the children of the brothers and sisters of the testator. other than the plaintiff Elizabeth, who were living at the death of David Burges, the son. In justification of the present proceedings the plaintiffs alleged, that although David Burges and the other principal parties to the former suit well knewthat the plaintiffs were then married and resident at Dublin, yet the plaintiff, John Garratt, was not made a party to that suit; and that the plaintiff Elizabeth, though made a party, was described as being out of the jurisdiction, and was not served with process to appear and answer, and never in fact did appear to the bill, or at the hearing: that many of the other parties thereto were not served with process to appear, and did not appear, and that the cause was ultimately heard as a short or consentcause, the material question therein being passed over without argument.

These allegations, so far as they raised any inference of fraud against the principal parties concerned, were denied by the answer of the executors. They, however, admitted their inability to state under what particular circumstances the cause was heard, though they believed that the argument as to the construction of the will was postponed until certain inquiries as to the state of the families mentioned in the will had been answered (a).

Under these circumstances, the present suit came on for hearing.

Mr. Anderdon and Mr. Cooke, for the plaintiffs.—The word "heirs" cannot be intended to mean executors, administrators, or even next of kin generally. It means issue of the body, whether children or grandchildren. The failure of the issue is referred to a particular time.

<sup>(</sup>a) It was stated, however, at did decide upon the construction of the bar, that the Master of the Rolls the will, after argument.

The testator directs the interest of his property to be divided in shares. No doubt there are many cases in which the gift of the interest is the gift of the capital; but it depends on the context. Here the gift to the wife and children is of the interest only. The one share of the interest is given to the wife for life, and then to devolve to the children and the longest liver. Then the remaining three shares, not of the property, but of the interest, is to be divided between his three children and the longest liver. and their heirs. Can it be said, that, where there is a gift of a mere usufruct to heirs, the word "heirs" can be held to mean issue generally, so as to carry the limitation to the utmost remoteness of time? The word must of course receive the same construction in both paragraphs of the will; and the Court will be disposed to restrict its meaning: Campbell v. Harding (a). It cannot be held to mean heirs general or next of kin, because, so long as the ultimate objects of the gift were living, the testator's children could not die without heirs general or next of kin. Upon considerations similar to this, the Court has acted in analogous cases: as, where dving without heirs generally has been construed to mean dying without heirs of the body, on the ground of the remainder-man being in the line of general heirship; or where, in some cases, dying without issue has been held to mean dying without leaving issue living at the death. Holloway v. Holloway (b); Nichols v. Hooper (c); Doe d. Lyde v. Lyde (d); Hughes v. Sayer (e); Target  $\forall$ . Gaunt (f); Forth  $\forall$ . Chapman (g); Crawford v. Trotter (h) .- [ The Vice-Chancellor referred to the observations of Sir William Grant, in Massey v. Hudson(i).

1842. GARRATT COCKERELL.

<sup>(</sup>a) 2 Russ. & M. 390; see p. 403.

<sup>(</sup>e) 1 P. W. 534. (f) 1 P. W. 432.

<sup>(</sup>b) 5 Ves. 399.

<sup>(</sup>g) 1 P. W. 666.

<sup>(</sup>c) 1 P. W. 198.

<sup>(</sup>h) 4 Madd. 361.

<sup>(</sup>d) 1 T. R. 593.

<sup>(</sup>i) 2 Mer. 133.

GARRATT 5. COCKBRELL.

Mr. Sidebottom and Mr. Collins, Mr. Russell and Mr. Wray, for defendants in the same interest with the plaintiffs, cited Bodens v. Watson(a), Pinbury v. Elkin(b), and Keiley v. Fowler(c).

Mr. Wilcock, for other defendants in the same interest, contended, that the word "heirs," as first used by the testator, could not comprehend heirs of the survivor of the children; the expression being "their heirs." It was clear, therefore, that the testator attached some particular meaning to the word; and it should seem that he meant issue living at the death of the children, dying successively. The word "heirs," in the second clause, must have the same meaning.

Mr. Wigram, (with whom was Mr. Cockerell), for the trustees.—It must be conceded, that the word "heirs" means heirs in some restricted sense. It seems clear, from the context, however, that it does not mean children. "Should all my children die without heirs." Then, supposing it means issue, it must be indefinite issue, unless there be words to control that meaning; and there are no such words. It is not necessary, however, to enter into that question; for even if the word have a definite meaning, the limitation over is equally void as being too remote. At the death of the surviving child, the division is to be made, not necessarily amongst individuals then living, but amongst those who may be living within the compass of certain joint lives; that is to say, the joint lives of the children of brothers and sisters who may be alive at the death of the testator's surviving child. Barlow v. Salter(d); Roe d. Sheers v. Jeffer, (e); Trafford v. Boehm (f); Mas-

<sup>(</sup>a) Ambl. 478; see 1 Hare, 428.

<sup>(</sup>d) 17 Ves. 479.

<sup>(</sup>b) 1 P. W. 563.

<sup>(</sup>e) 7 T. R. 589.

<sup>(</sup>c) 3 Bro. P. C. 299, ed. Tom.

<sup>(</sup>f) 3 Atk. 449.

sey  $\forall$ . Hudson (a); Donn  $\forall$ . Penny (b); Keiley  $\forall$ . Fowler; Bigge  $\forall$ . Bensley (c).

GARRATT

Mr. Swanston and Mr. Roupell, for the executor of David Burges.

Mr. Anderdon, in reply.

In the course of the argument, the Vice-Chancellor referred to Wilkinson v. South (d), and Carter v. Bentall (e). The following cases were also cited and commented upon: Trotter v. Oswald (f); Doe d. Smith v. Webber (g); Gawler v. Cadby (h).

THE VICE-CHANCELLOR.—The only point which has been argued in this case is the question of construction; whether, namely, the will of Mr. Burges, the testator in the cause, contains a valid limitation in favour of one of the plaintiffs, the wife of the other plaintiff, which has taken effect. It was thought convenient, that this should be argued singly in the first instance, reserving the other points in the cause; inasmuch as, in the event of the plaintiffs failing on the question of construction, the suit must of necessity wholly fail.

The will, which relates only to personalty, was thus— [His Honour here read the will]. It is admitted, that none of the testator's three children married in his life-time; that two of them survived the testator; that all are now dead; that neither of the children ever had any issue; that not any brother or sister of the testator had before the date of his will died leaving issue; that, at the death of the survivor of the testator's children, there were chilMay 24th

<sup>(</sup>a) 2 Mer. 130.

<sup>(</sup>b) 1 Mer. 20.

<sup>(</sup>c) 1 Bro. C. C. 187.

<sup>(</sup>d) 7 T. R. 555.

<sup>(</sup>e) 2 Beav. 551.

<sup>(</sup>f) 1 Cox, 317.

<sup>(</sup>g) 1 B. & Ald. 713.

<sup>(</sup>h) Jac. 346.

GARBATT D. COCKERELL.

dren living of some of the testator's brothers and sisters; and that the plaintiff, Mrs. Garratt, is one of those children.

It is in the right of Mrs. Garratt, in this character only, that the plaintiffs sue; and they are to be considered as contending, that, according to the true construction of the will, the word "heirs," as used in it, means either "children" or "issue;" that the limitation in favour of the children of the testator's brothers and sisters was intended to take effect only in the event of the testator's children respectively either never having a child, or not leaving any child or any issue living at their respective deaths, or living at the death of the survivor; that the limitation was, therefore, valid; and that, if valid, it has, upon the admitted facts, taken effect.

Now, as to the word "heirs," I hold, with the plaintiffs, that it means either "children" or "issue," as used in this will.

The next question is, did the testator mean the limitation in favour of the children of his brothers and sisters to take effect only in the event of issue not being born to either of his own children? My impression is, that his language does not authorize such an interpretation. To hold, in the next place, that, by dying "without heirs," he meant dying without leaving a child, would, I think, be wrong, if for these reasons only, that the testator repeatedly uses the word "children;" and that, when the will was made, it was neither impossible nor highly improbable that, though all his children might die without leaving any child, some one of them at least might leave a grandchild, whom the testator cannot be supposed to have wished to deprive of his property in favour of collateral relatives. I read the word "heirs" as "issue," and not as "children."

Did, then, the testator, by dying "without heirs," mean dying without issue living at the respective deaths of his children, or living at the death of the survivor of them? For, if he did not, the consequence must, I think, be, to say that he meant a failure of issue not confined as to time within legal limits; and, therefore, that the limitation under which the plaintiffs claim is void.

GARRATT U. COCKBRELL.

This case is not affected by the recent statute; and I conceive, that, if the word "alive," and the immediately following words, "on the death of my last child," had not been in the will, I must have held an indefinite failure of issue to have been intended.

But then comes the question, what, if any, is the effect of these words upon the construction of the expression "die without heirs," which I read as "die without issue?" Can the word "alive," whether applying to the testator's brothers and sisters, or to their children, be properly read as referring, in point of time, to the date of the will, or the death of the testator, and not the death of his last surviving child? If it cannot, are the words, "on the death of my last child," applicable to the actual division of the property, as well as to the period at which the collateral relatives, intended to be benefited, are to be ascertained? Are they sufficient, in a case of this kind, to shew that he meant the selected collateral relatives to become entitled in possession at the death of his last child, if at all? Do they, in short, furnish ground solid enough to support a restrictive construction for the phrase, "die without heirs?"

Here, as it seems to me, lies the difficulty of the case.

It is true, generally, as Sir William Grant said, in Massey v. Hudson (a)—"A bequest to A., after the death of B., does not import that A. must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B.'s death may happen. So, if the bequest be to A., in case B. shall die without issue. If that were allowed to be a good bequest, A.'s representa-

GARRATT

COCKERELL

tives would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote." Though it is true also, as he immediately adds—"But if A. is personally to take the legacy, then the presumption is strong, that an indefinite failure of issue could not be in the testator's contemplation."

It is consistent with an intention on the testator's part to fix the time of the death of his last surviving child as the period at which the number and description of his collateral relatives to be benefited should be ascertained, that he should not have intended their interests to become necessarily at the same time interests in possession. may be argued plausibly, perhaps soundly, that the words now under consideration, are not substantially more favourable to the plaintiffs than the language of the will in Barlow v. Salter (a) was to the unsuccessful party there. That case was earlier, by some years, than Massey v. Hudson, and in it Sir William Grant thus expresses himself-"It appears in some of the early cases, that the Judges inclined to hold these words to mean, without issue at the death of the person named; but ever since the case of Beauclerk v. Dormer (b), I think a different rule has prevailed; and it is now settled, that, unless there are expressions or circumstances from which it can be collected that these words are used in a more confined sense, they are to have their legal signification: viz. death without issue generally. The Court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one; which, however, is done, when the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restrictive intention (c)."

In the intermediate case of  $Donn \ v. \ Penny(d)$ , we find the same eminent Judge saying, "In the case of  $Barlow \ v.$ 

<sup>(</sup>a) 17 Ves. 479.

<sup>(</sup>c) 17 Ves. 481, 482.

<sup>(</sup>b) 2 Atk. 308.

<sup>(</sup>d) 1 Mer. 21.

Salter, I gave my opinion as to the rule of construction which ought to govern cases of this description; and the rule which is there laid down is not to be departed from, unless it be made satisfactorily to appear, from some expression in, or circumstances connected with, the will. that the testator's intention was otherwise."

1842. GARRATT COCKERELL.

It may, on the other hand, be without absurdity, if without success, contended that, even supposing it to be clear that the word "alive" does not refer, in point of time, to the date of the will or the testator's death, it is consistent with a reasonably possible intention on the testator's part, and with fair interpretation of his language, to read the will as making the time of the death of his last surviving child the appointed period of actual division among the collateral relatives, if any, becoming entitled; as providing that their interests were then to be interests in possession, or never to arise. The plaintiffs may farther. not absurdly, if not successfully, contend that such a restrictive construction, ut res magis valeat, is one to be adopted if rationally possible; one to be favoured, and which has by great Judges, and the highest authority, been, in analogous instances, favoured; and that, of the cases bearing on this kind of question—from which Pinbury v. Elkin (a), (a decision doubted, as it seems, by Sir William Grant), Forth v. Chapman (b), Keiley v. Fowler (c), Chamberlain v. Jacob (d), Wilkinson v. South (e), Trotter v. Oswald (f), Gawler v. Cadby (g), and Ranelagh v. Ranelagh (h), (authorities not to be slightly regarded), are only a selectionsome at least proceed upon evidence of intention not stronger than the present case affords in favour of the restrictive construction.

The published speech of Lord Chief Justice Wilmot de-

- (a) 1 P. W. 563.
- (b) Id. 666.
- (c) 3 Bro. P. C. 299.
- (d) Ambl. 72.

- (e) 7 T. R. 555.
- (f) 1 Cox, 317.
- (g) Jac. 346.
- (h) 2 Myl. & K. 441.

GABRATT

U.

COCKERELL.

livered by him upon the case of Keiley v. Fowler in the House of Lords, contains some remarkable passagesamong them the following: after referring to Beauclerk v. Dormer, and some other authorities, he says, "What do all these cases prove? That they have admitted the rule; that they have shut their eyes, as we do, upon the vulgar sense of the words 'if die without issue.' and swallowed the legal sense, bitter as it is: this was done to avoid confusion, and disturbing personal property enjoyed under the sanction of it; but, at the same time, they have catched at any word or expression which might bring the case out of the rule. They have remembered what Lord Hobart (a) recommends to Judges 'to be curious and almost subtle. astuti. (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which. by rigid rules, might be wrought out of the act.' Implication is only presumed intention, and presumption only stands till the contrary appears; and, therefore, if other parts of the will repel that presumption, it loses all its power of directing the construction of the sense (b)."

Again, after noticing the personal confidence appearing to be reposed in the executors, he says, "But there is still a further and most decisive evidence of intention, arising from the persons amongst whom the estate is to be distributed; namely, the children of his sister. The testator had a daughter and six nephews and nieces, the children of his sister, Elinor Fowler. He says, 'If my daughter marries with consent, and leaves issue, she shall have all my fortune; if not, I substitute the children of my sister in her place,' (taking three or four small legacies out of it). These must be considered as portions and personal

<sup>(</sup>a) Hob. 277.

<sup>(</sup>b) Wilm. Notes, pp. 314, 315.

provisions for them. There are established known distinctions between legacies by and to strangers, and by parents or persons standing in the place of parents. In the latter case, they are always considered as portions and personal provisions, which furnishes a strong argument of personality: and it was so admitted by Lord Hardwicke in Beauclerk v. Dormer (a), 'Something plausible might be said. if this was to be construed as merely personal to her:' but in that case, not only Miss Dormer, but Lord George and Lady Diana were all strangers to the testator (b)." And at the conclusion, speaking of the words "die without issue," we find him thus expressing himself: "The truth is, these words are condemned by the law to be surly, rigid, inflexible, and immovable, when they are alone; but, if they can but once be got into sensible company, they lose their gloomy, dogmatical, arbitrary disposition, and both speak and act as the rest of the company do. And combining all the words and passages in the will, and the circumstances I have mentioned, together, they form a body of evidence which carries resistless conviction with them to our understandings (c)."

GARRATT 0. COCKERELL.

Now the case of Keiley v. Fowler (d)—in which the judgment of the Irish Court of Chancery was affirmed by the House of Lords in the time, I believe, of Lord Chancellor Camden, it is to be supposed with his concurrence, certainly in accordance with the unanimous opinion of the consulted Judges after time taken to consider—is, in all respects, of the very highest authority. Considering that, in that case, the executors had no discretion to exercise as to the mode of distributing the property; that the daughter might have died leaving issue, which might afterwards have failed living the original executors; that, on the other hand, the daughter might have survived the executors, and might

<sup>(</sup>a) 2 Atk. 311.

<sup>(</sup>d) 3 Bro. P. C. 299, ed. Toml.;

<sup>(</sup>b) Wilm. 317, 318.

Wilm, 298,

<sup>(</sup>c) Id. 321.

GARRATT

COCKERELL.

afterwards have died without leaving issue, in which event the children of the sister or their representatives must probably have been held entitled to take, whether those children did or did not survive the daughter, it may, I think, be fairly doubted whether the circumstances held to be sufficient to repel the presumption of the unrestricted sense of the words "die without issue" were more than exceedingly slight circumstances. But it is not to be forgotten that the Lord Chief Justice, in the speech to which I am referring, said, "Every case stands upon the evidence of the testator's intention arising out of each will. questions of intention, cases, unless they coincide in words and every other circumstance, never assist but perplex the exposition. A will is the picture of a man's mind, and one may as well look at the picture of one man to know the person of another, as look at the will of one mind to know the mind of snother (a)."

And it is true that other eminent Judges have expressed themselves in somewhat similar terms, yet still those learned persons did not mean to deny that there are some established rules and principles of construction from which Courts of Justice cannot properly depart; or, to deny that if the Supreme Court of the kingdom has, on a question of construction in a particular case, recognized and proceeded on some general rule or general principle, the subordinate courts are thereafter to govern themselves by that general rule or general principle, and are not to elude or evade it.

Now, although Keiley v. Fowler turned upon the construction of an instrument, I am not sure that it did not involve the recognition of a general rule or principle laid down in some earlier cases to which all the later cases in the subordinate courts may be thought not to have entirely adhered. Campbell v. Harding (b) certainly is a decision equally of the House of Lords, where it was under the title

<sup>(</sup>a) Wilm, 319.

of Candy v. Campbell (a). The words, however, there were these :-- "In case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time." Lord Brougham, when the case was before him as Chancellor in this Court, treated the word "then" as a word of reference relating to the determination of the first limitation, and meaning merely "in that event" or "if that happens," as a word of reasoning rather than of time, and held accordingly, that the words "at the time" meant at the time, whether at or whensoever after the death when the issue should fail. He says, "It is, therefore, impossible, according to any fair principle of construction, to carry the case further upon the expression "at the time" than upon the word "then" used as an adverbof time. question then resolves itself into this, ought that expression to be construed as referring to the time of the decease, or to the time of the failure of issue? and that again brings us round to the point from which the inquiry originally set out, that is to say, to the construction to be put on the clause of gift itself. Indeed, it is only by a petitio principii, or something very like it, that the least shadow of argument can be founded on the expression "living at the time," and that only by importing it into the clause from a subsequent part of the will (b)."

a subsequent part of the will (b)."

Upon the appeal in the House of Lords (c), Lord Brougham referring to Barlow v. Salter appears, from Mr. Bligh's report, to have said, "There were not in that case the words 'at the time;' but you must construe those words rationally, and they are as consistent with the argument for the respondent as for the appellants. The time indicated may be of issue living at the death of the first taker, or it may point to indefinite failure of issue. If the limitation can be made out by context to mean at the death,

1842.

<sup>(</sup>a) 8 Bligh, N. S. 469. (b) 2 Russ. & M. 412, (c) 8 Bligh, N. S. 492,

GARRATT 8.

you do not want the words, for you have the estate by the limitation. If the other construction is put on them, the case is decided against the limitation over." On the whole it may be thought consistent with what was decided in *Campbell* v. *Harding*, that, if the words had been "living at her death" instead of "living at the time," the judgment might have been the other way.

The gift in the present case is to the "children of my brothers and sisters alive on the death of my last child."

I have since the conclusion of the argument considered, besides the cases which I have mentioned,—Exel v. Wallace (a); Bigge v. Bensley (b); Doe v. Lyde (c); those of Crowder v. Stone (d); Murray v. Addenbrooke (e); Lepine v. Ferard (f); Malcolm v. Taylor (g); Dunk v. Fenner (h); Ferard v. Griffin(i), and various others;—I think I may say, every printed authority bearing at all importantly on the question now before me. I cannot certainly say of it, as Mr. Justice Buller did of the question in Doe v. Lyde,—"Nothing in my opinion can raise a doubt in this case but overwhelming it with a number of cases,"—for I doubted as much before I began to read them for the present purpose as I do now, and that is exceedingly.

I may now observe, however, that this will has been brought under the consideration of the present *Master of the Rolls* in another suit, *Burges* v. *Blommart* (k), in 1837; and if the view taken by his lordship of the instrument is correct, the limitation under which the plaintiffs claim is void, and they have not, nor ever had any title.

The question upon which I now am, is not whether they are in any manner or to any extent bound by that decree, nor am I now to decide or consider whether independently

- (a) 2 Ves. sen. 318.
- (b) 1 Bro. C. C. 187.
- (c) 1 T. R. 593.
- (d) 3 Russ. 217.
- (e) 4 Russ. 407.

- (f) 2 Russ. & M. 378.
- (g) Id. 416.
- (h) Id. 557.
- (i) 2 Keen, 615.
- (k) See ante, p. 495.

of the question of construction it is erroneous, irregular, or informal. For the present purpose it must be assumed not to bind the plaintiffs. But I may say that, if it be open to objections independent of the question of construction, I consider this as attributable to the parties, and not to the Court under whose attention nothing as I collect was brought beyond that single and simple question; which question, however, his Lordship did certainly decide, having before him parties claiming in the same manner by the same title or supposed title as the present plaintiffs, and he decided it, as I am informed by the bar, after an adverse argument conducted on either side by counsel of weight and consideration. I cannot, therefore, refuse to look, as matter of precedent or authority, at what was thus done by a judge in the position of the *Master of the Rolls*.

GARRATT v.

If, indeed, independently of his decree, I could have formed a conclusion fully satisfactory to my mind, in favour of the plaintiffs' title, I might probably have deemed it my duty not to give way to the disposition which I must feel to prefer his judgment to my own, and to the distrust with which I must regard an opinion of mine differing from his. But I have been unable to form such a fully satisfactory conclusion. A judicial dissent on my part from that which he has adjudicated, ought to be founded on the clear conviction of my mind, that the decision is erroneous. Such a clear conviction I do not feel.

On the whole I must consider Lord Langdale's authority as outweighing any doubts of mine, and deferring to it and swayed by it, though not fully satisfied that in its absence I should have arrived at the same conclusion, I dismiss the bill.

I have collected from the bar, that this case will be, and in any event would have been, taken probably before the Lord Chancellor. I think such a course reasonable on the part of the plaintiffs. I think if I had decided in their favour, it would have been reasonable on the part of the adverse defendants.

1842.

THOMAS and Others v. Jones.

Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool, through which ran a stream from the mountains, depositing, in its passage, mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, shine, deposit, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled. loosened, disturbed, or floated off, any soil, oxide of iron, ochre, shine, deposits, or mineral substances. already deposited, or thereafter to be deposited, upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law brought by them against the defendant, and not in an issue or action directed by the Court.

THE bill in this case was filed by Jane Thomas as seised in fee, subject to a mortgage to the other plaintiffs, of a farm and lands called Llaethdu, in the parish of Amlwch, in the county of Anglesey. The bill stated, that the farm and lands abutted towards the south and on the southeast and south-west sides thereof on lands belonging to the Marquis of Anglesey, and on the north-west side thereof upon lands belonging to, or occupied by, the defendant Joseph Jones, either alone or jointly with other persons.

That the farm and lands of Llaethdu consisted in part of several acres of land covered with water, called Llaethdu Pool, and in part of a piece or parcel of land covered with water, called the Lower Pool, - the Lower Pool being situate at or near the north-west extremity of the farm and lands called Llaethdu. That a stream or watercourse, having its source or spring in or near to a mountain called Pary's Mountain, and in a part of the lands which belonged to the Marquis of Anglesey, for a very long period of time, and greatly exceeding twenty years, had run and flowed from Pary's Mountain down to and through part of the farm and lands of Llaethdu into and through the said pool called Llaethdu Pool, and from the said lestmentioned pool over other part of the same farm and lands of the plaintiff Jane Thomas, to and into the pool called the Lower Pool, forming in part of its course the north-western boundary of the farm and lands of Llaethdu; and, during the whole of the said period of time, the said two pools had always been supplied with water from and by the said stream or watercourse.

That all such parts of the bed of the said stream or watercourse as were situate between the lower end of the pool called Llaethdu Pool and the upper end of the pool called the Lower Pool were part and parcel of the Llaethdu estate, and were the exclusive property of the owners of that estate.

THOMAS

That the water of the stream or watercourse was, and for a very long period of time had been, continually charged or impregnated with mineral substances of great value, and, amongst other mineral substances, with a ferruginous earth, ochre, or calx, of a yellow colour, of great value, called oxide of iron, ochre, or shine; and the stream or watercourse, when it flowed in its usual and accustomed manner, and as it of right ought to flow, deposited upon the beds of the stream, and upon the beds and bottom of the two pools called Llaethdu Pool and the Lower Pool, and also upon other lands of the plaintiff Jane Thomas, part of the said farm of Llaethdu, over which it flowed in its passage from the pool called Lisethdu Pool to the pool called the Lower Pool, large quantities of the said oxide of iron, ochre, shine, or other matters; and that the said stream or watercourse had in fact deposited upon the beds of the said two pools called Llaethdu Pool and the Lower Pool, and upon other parts of the said farm and lands called Llaethdu, large quantities of the said oxide of iron, ochre, or shine, and other matters and substances, and all which said oxide of iron, ochre, or shine, and other matters, when so deposited, became part of the soil of the said beds, and of the land on which they were deposited as aforesaid, and were of great value.

That the defendant Joseph Jones was, and for a considerable time past had been, either by himself or together with other parties unknown to the plaintiffs, the owner or occupier of a mill called Melin Adda, in or near Amlwch aforesaid, situate upon or near the said stream or watercourse, but lower down the stream or watercourse than the pool called the Lower Pool; and that the defendant Joseph Jones was, and for several years past had been, either alone or together with other persons unknown to.

THOMAS

the plaintiffs, the occupiers of a certain pool or piece of land, covered with water, called Cerrig y Bleiddia Pool, situated higher up the said stream or watercourse than the pool called Llaethdu Pool, and upon the lands of the said Marquis of Anglesey, and between the farm and lands of Llaethdu and the source of the said stream or watercourse; and that the said stream or watercourse, for a long period of time, had of right flowed, and still of right ought to flow, through and from the said pool called Cerrig y Bleiddia Pool, through and over certain parts of the farm and lands of Llaethdu into the said pool called Llaethdu Pool, and from thence into the pool called the Lower But the said Joseph Jones had lately, from and out of the beds and bottom of that part of the stream or watercourse which was situated upon and formed part of the farm and lands called Llaethdu, and from and out of the bed and bottom of the pool called Llaethdu Pool, and of the pool called the Lower Pool, taken and carried away large quantities of soil, and of the aforesaid oxide of iron, ochre, shine, and deposit belonging to the plaintiff, Jane Thomas, and which had been previously deposited by the stream or watercourse in and upon the aforesaid parts of the said beds and bottom, and had in fact become part of the soil of the said beds and bottom, and were of great value; and that he had sold the same for large sums of money, and for his own benefit and advantage, or he had in some other way converted the same to his own use and profit.

That whenever the water of the said stream or water-course did not flow and run into the pool, called Llaethdu Pool, in regular quantities, but in larger quantities, and more forcibly and rapidly than it usually did, such increased quantity of water had always or generally and frequently the effect of disturbing and agitating the stream and the pools called Llaethdu Pool, and the Lower Pool, and of thereby carrying off great quantities of the soil of the bed and bottom of the said stream and pools, and of the said

oxide of iron, ochre, shine, or deposit, and of preventing any further deposit of the said mineral substances, and particularly of carrying off the finest and most valuable part of such substances, and of preventing the same from being deposited upon the beds of the said stream and pools, and of causing the whole or the greater part of the said substances which would otherwise have been deposited upon the beds of the said pools, and part of the said substances which had already been deposited there, to be carried out of the said pools into a lower part of the said stream or watercourse.

That the defendant Joseph Jones had lately erected and continued, or caused to be erected and continued, in and upon the said pool called Cerrig y Bleiddia Pool, certain dams and other erections for the sole purpose of thereby occasionally damming up the water of the stream in the pool called Cerrig y Bleiddia Pool, and preventing the stream from running and flowing in its usual and accustomed way from the pool called Cerrig y Bleiddia, to and into the pools called Llaethdu Pool and the Lower Pool, and that the dams and other erections were a contrivance of the defendant Joseph Jones, whereby he was able either to prevent the water of the stream from running and flowing from the said pool called Cerrig v Bleiddia Pool, into the pools called Llaethdu Pool and the Lower Pool, or to cause the water to flow and run in larger quantities and with greater force than it usually did from the pool called Cerrig y Bleiddia Pool into the pools called Llaethdu Pool and the Lower Pool; and the defendant Joseph Jones had also cut, dug, and made and continued in and out of the sides and bed or bottom of the pool called Llaethdu Pool, and of the stream or watercourse between the pool called Llaethdu Pool and the Lower Pool, and of the Lower Pool and other parts of the stream or watercourse, trenches, channels, cuts, and reservoirs of considerable depth and width, and by means of the said dams and other erections, and of the THOMAS

U.

JONES.

THOMAS
v.
JONES.

said channels, cuts, and reservoirs or by some of such means, the defendant Joseph Jones had frequently and for long periods of time prevented the water of the said stream or watercourse from flowing and running in regular quantities from the pool called Cerrig y Bleiddia Pool to and into the pool called Llaethdu Pool, and from depositing upon the bed of the said last-mentioned pool the aforesaid mineral substances, or any of them; and the defendant Joseph Jones, by means of the said dams and other erections, and of the said trenches, channels, cuts, and reservoirs, or by some of the said means, caused the water of the said stream or watercourse frequently and for long periods of time to run and flow into and through the pool called Llaethdu Pool and the Lower Pool, and that part of the stream or watercourse which was between the said two pools, in larger quantities, and with greater force and rapidity than it otherwise would have done; the effect of the said water so running and flowing into the said pool called Llaethdu Pool, and the Lower Pool, and the stream or watercourse, in increased quantities, and with greater force and rapidity, being to prevent the water from depositing upon the bed of the said pools and stream any part of the said mineral substances wherewith it was then charged or impregnated; and to cause all such mineral substances, together with large quantities of the like mineral substances which had been previously deposited by the watercourse upon, and were then lying upon, the bed of the said pools and stream, and had become part of the soil thereof, to be carried and conveyed by the water so running and flowing in increased quantities and with greater force and rapidity out of the said pool and into the said channels, cuts, and reservoirs, and to be deposited by the said water upon the beds and at the bottom of the said channels, cuts, and reservoirs.

That by the means aforesaid large quantities of soil, oxide of iron, cehre, shine, and other mineral substances, and deposits of great value, had been deposited in and upon the beds of the said channels, and cuts, and reservoirs, which would have been deposited or remained upon the bed of the said pools and stream, or upon some other parts of the farm and lands of the plaintiff, if the said dams and other erections had not been wrongfully made and continued, and the said channels, cuts, and reservoirs had not been wrongfully cut, dug, made, and continued by the said defendant Joseph Jones: and the defendant Joseph Jones had taken, and carried away, and sold, for large sums of money, or in some other manner converted and applied to his own use and benefit, the whole of the said soil, oxide of iron, ochre, and shine, and other mineral substances and deposits, which by and owing to the means aforesaid had been deposited in and upon the beds of the aforesaid channels, trenches, cuts, and reservoirs.

That the defendant Joseph Jones had, at different times, assumed a right to the disposition and control of the oxide of iron, ochre, shine, or deposit, by the said stream or watercourse, and especially in or about the month of November, 1885, when one David Jones having wrongfully removed, or caused to be removed, some portion thereof, the defendant Joseph Jones directed the said David Jones, or his workmen, to cease from doing so, and placed the oxide of iron, ochre, shine, or matter, which had been so removed, or caused the same to be placed in a warehouse or other place, at the port of Amlwch, under the control of the defendant Joseph Jones, and had subsequently disposed of, or converted the same to his own use, and had not in any manner accounted to the plaintiffs for the same.

The bill charged that, during three months in the summer of the year 1836, a great number of men were employed, and by, or by the direction, or with the privity, of the said defendant, in the said pool called the Llaethdu Pool, and the said Lower Pool, and that part of the said stream which was between those pools, or some or one of

THOMAS

THOMAS t. Jones.

them, and that the men so employed did then and there cut, heap, disturb, and puddle divers large quantities of soil, oxide of iron, ochre, shine, and other mineral substances, and other deposits which then were deposited on the bed of the said pools and stream, and formed part of the soil of the said farm and lands called Llaethdu, and did mix the said soil, oxide of iron, ochre, shine, and other mineral substances, and other deposits with the stream of water which ran into the said pool, called Llaethdu Pool, from the said pool, called Cerrig y Bleiddia Pool.

That the defendant had also caused several reservoirs or basins to be cut and made on one side of the said stream, and lower down the said stream than Llaethdu Pool, for the purposes of receiving all the said soil, oxide of iron, ochre, shine, and other mineral substances and deposit which might be floated off and carried by the stream out of the pool, called Llaethdu Pool, and of causing all such soil, oxide of iron, ochre, shine, and other mineral substances and deposits, to be carried to and deposited on a certain farm or lands belonging to or occupied by the defendant, called Glanyllyn, which were situate near to the said stream, in its course from the Llaethdu Pool to the said Lower Pool.

That the necessary or actual consequence and effect of the said cutting, heaping, puddling, and mixing and stirring up was to cause divers large quantities of the said soil, oxide of iron, shine, and other mineral substances and deposits, to be floated off and carried out of the said pool, called Llaethdu Pool, into the said reservoirs and basins.

The bill charged that the said several acts and doings of the defendant had caused great and irreparable injury to the farm and lands of Llaethdu, and that the defendant had, by the means and in the manner aforesaid, carried and taken away, and caused to be taken and carried away from and off the said farm and lands called Llaethdu, and converted to his own use large quantities of the soil of the said farm and lands of great value, and that all such soil formed part of the inheritance of the said farm and lands.

THOMAS

JONES.

The bill charged that, in or about the year 1779, one Rice Thomas, since deceased, was the owner of the said farm and lands called Llaethdu; and that, in or about the year 1779, Rice Thomas made a lease, for three lives, of the said farm and lands to the Rev. Edward Hughes and Thomas Williams, Esq., and that one of the said three lives was still living, and the lease was still subsisting; and that there were expressly excepted and reserved out of the demise thereby made all timber and other trees, woods, and underwoods, quarries, mines, minerals, of what nature or kind soever at the time of making the said lease, standing, growing, and being, or which should or might thereafter, grow, arise, or be discovered in, upon, or under the surface of the said demised premises, or any part thereof. That, in or about the year 1781, part of the premises comprised in the said lease of the 12th day of November, 1779, were assigned or underlet to one Jonathan Roose, and that the remainder of the premises were, in or about the year 1807, assigned or underlet to James Roose and William Hughes, and that the said James Roose died, having appointed his widow, Ellen Roose, executrix of his last will and testament, and, by such last will and testament, he devised to her his interest in the said lease; and that, after the death of the said James Roose, the defendant married his daughter, and claimed to be entitled, under and by virtue of some assignment or underlease, to all and singular the premises comprised in the said lease of the 12th day of November, 1779, as tenant thereof, and that, as such tenant, he pretended that he was entitled to take and carry away from and out of the said pools, and from and out of the bed of the said stream or watercourse, at his free will and pleasure, all the oxide of iron, ochre, shine, and other mineral substances deposited in the said pools or upon the bed of the

THOMAS

said stream, and that the said deposit was not included in the said exception and reservation of all quarries, mines, and minerals.

The bill charged that if the said deposit should not be considered to be within the words or spirit of the said exception and reservation, the defendant was not entitled, and never was entitled as such tenant as aforesaid, or in any other character or right, to take and carry away from and out of the said pools, or from or out of the bed of the said stream, any part of the said deposit, and that all such deposit formed part of the soil of the said demised premises, and that the said defendant, by taking and carrying away the said deposit, had committed, from time to time, waste and destruction on the said demised premises.

The bill charged, as evidence of the right of the plaintiff J. Thomas to the said deposit, and of the defendant's acknowledgment of such right, that in the year 1883 the defendant was desirous of removing out of the said pools or one of them, or out of the said stream, some part of the said deposit, and that the defendant upon that eccasion applied to plaintiff Jane Thomas, or her agent, for permission so to do; and that such permission was granted to him, or understood to be granted, in consideration of his agreeing to pay the plaintiff Jane Thomas, as he in fact did agree, certain royalties or rents for the same; but the plaintiff Jane Thomas, shortly after such agreement was made, or understood to be made, refused or discontinued such permission, as she was entitled to do; and in the month of October, 1833, one Frederick Lowry Barnwell, the solicitor and agent of plaintiff, called on the said defendant, and gave him notice of such refusal or discontinuance, and requested the said defendant to desist from further taking or meddling with the said soil, oxide, shine, or other deposit.

That in the month of May, 1883, the said defendant

delivered to the plaintiff Jane Thomas a written statement in his own handwriting of the amount of royalty.

The bill charged that a large quantity of oxide of iron, ochre, shine, and other mineral substances of large value, was then lying upon the beds of the said pools, or of the said watercourse, or near thereto; and that all such deposit formed part of the soil of the said farm and lands called Llaethdu, and that the said defendant intended to take and carry away the same.

The Bill prayed a reference to the master to take an account of the quantity, quality, and value of all the soil, oxide of iron, ochre, shine, and other mineral substances and deposits which had been carried and taken away, by or by the order of the said defendant, from and out of or from the bed and bottom of the pool called Lisethdu. And that the defendant might be ordered to pay to the plaintiff Jane Thomas, what, upon taking the said account, should be found to be the value of the said soil, oxide of iron, ochre, shine, and other mineral substances and deposits; and that the defendant, his servants, workmen, and agents, might be restrained by the order and injunction of this honourable Court from taking. carrying away, and removing, or causing to be taken, carried away, and removed from and out of the said pool called Liaethdu Pool, any soil, oxide of iron, ochre, shine. deposit or mineral substances; and that the said defendant, his servants, workmen, and agents, might be restrained from puddling, loosening, disturbing, and floating off, and from causing to be puddled, loosened, disturbed, and floated off, any soil, oxide of iron, ochre, shine, deposits, or mineral substances, which had already been deposited, or which might thereafter be deposited upon the bed of the said pool, called Llaethdu Pool; and from doing and causing to be done any act matter, or thing whatsoever, whereby the water of the said stream or watercourse might be prevented from depositing upon the bed of the said

1842.

THOMAS

v.

JONES.

THOMAS

pool, called Llaethdu Pool, the oxide of iron, ochre, shine, and mineral substances, with which it then was, or thereafter might be, charged or impregnated, or whereby the oxide of iron, ochre, shine, and mineral substances, with which the said stream or watercourse then was, or thereafter might be, charged or impregnated, or any soil or other substance which might be deposited upon the bed of the said pool, called Llaethdu Pool, and might be carried and floated out of and from the said pool; and that the said defendant, his servants, agent, and workmen might in like manner be restrained from committing any further waste or spoil to such part (if any) of the said demised premises, as consisted of the said pool, called Llaethdu Pool, or any part thereof, the plaintiffs thereby waiving all penalties and forfeitures (if any) incurred by the said defendant on account of the several matters and things therein complained of.

The defendant by his answer admitted the title of the plaintiffs, as stated in the bill, to the Llaethdu farm, and that he was tenant for a life or lives under them of the farm, and in possession accordingly. He further stated that the pool called Llaethdu Pool was latterly of much greater extent than it was in the year 1779: that as to that part of the pool, as it at present was, which was not covered with water in 1779, it formed part of Llaethdu farm, but that as to the residue thereof, viz. the more ancient part of the pool, it formed no part of the Llaethdu farm, and that the plaintiffs had no title to or interest in it. That he, the defendant, or the Melin Adda Company, of which he was a member, was or were in fact seised in fee of the ancient pool; or that, if he alone was not, or he and the Company were not, seised in fee of the ancient pool, yet that the Mill Company, of which he was a member, having mills lower down the stream, had at all hours of the day and night been accustomed to scour and cleanse the upper part of the stream, including its course through the pool,

for the purpose of facilitating the use and working of the mills. The defendant admitted the deposits made by the stream in its course through the pool; and he admitted that in and before the year 1833, he had taken part of the soil thus deposited and converted the same to his own use, and for which, under an arrangement, he paid a royalty to the plaintiff; but that since 1833, and particularly in the year 1836, he had raised and taken the soil in the usual and ordinary course of scouring and cleansing the upper part of the stream for the purposes of the mill, and that in so doing he had necessarily and lawfully removed and dislodged parts of the soil, by means of which those portions of the soil had been exposed to the action of the water, and had been with the water used by those to whom the water had come, in that mixed state.

Issue was joined in the cause, and witnesses were examined on both sides. After issue had been joined, and publication had passed in the cause, an action of trespass on the case for the damage done to the reversionary interest of the plaintiffs was commenced against the defendant and his partners by the plaintiffs against the defendant Jones and his copartners, the Melin Adda Company, in respect to the matters forming the subject of the bill.

The equity suit came on to be heard before Lord Cottenham on the 17th November, 1840.

Mr. James Wigram and Mr. Ellison, for the plaintiffs.

Mr. Girdlestone and Mr. Metcalfe, for the defendants.

By the decree of Lord Cottenham, dated the 25th January, 1841, the plaintiffs' bill was dismissed with costs, so far as related to the lower pool, and as to the whole of the plaintiffs' demands prior to the 10th October, 1833.

1842.

v. Jones. THOMAS

V.

JONES.

The bill so far as related to the whole of Llaethdu Pool, and as to the demands of the plaintiff, in respect of such pool, since 10th October, 1883, was retained for a twelvemonth, and in the mean time the plaintiff was to be at liberty to proceed to a trial of the action brought by the plaintiffs, or some of them, against the defendant, in relation to the matters in respect of which the bill was retained.

The action at law was tried, and a verdict was found for the plaintiffs (a).

The cause now came on for hearing on the equity reserved.

Mr. Simpkinson and Mr. Welsby, for the plaintiffs, contended that the verdict and judgment at law had settled the question of title, and that the account and perpetual injunction were consequential.

Mr. Girdlestone, Mr. Metcalfe, and Mr. G. Price, for the defendants, insisted that the action had not really tried the question which the Lord Chancellor intended to be tried, viz. what particular part of the surface now covered with water consisted of the old pool within its ancient limits, and what particular part thereof consisted merely of accretion.

Feb. 25.

THE VICE CHANCELLOR—[After stating the proceedings and Lord Cottenham's decree]—Now this decree has never been sought to be reheard or appealed from, as I understand it. The action proceeds, is tried, there is a verdict and final judgment. We will now see what that action is which Lord Cottenham held, and must have held, to be that by which his conduct, or the conduct of the Judge who might hear the cause at a subsequent period, should

(a) The nature of the pleadings and of the issues joined in the ac-

be regulated. Let us see what that action was, rejecting the matters which relate to the lower pool and the narrow part of the stream. The first count stating the title, and the acts alleged to be wrongful, complains of them as to the damage and injury of the reversion, and concludes for damages. The defendant pleaded several pleas. Now it must be remembered that those pleas are pleaded, as the record states, on the 24th February, 1841, the date of Lord Cottenham's decree being the 25th of January preceding. The first plea is the general issue as to the ancient part of Llaethdu Pool; that is, merely denying the wrongful acts imputed. Issue is joined on that, and the verdict and judgment are for the plaintiffs, establishing against the defendant that he had done those acts. The second plea, as still confined to the ancient part of Llaethdu Pool, is, that the persons alleged to be tenants of it, and under whom the defendant would claim if they were tenants, were not so tenants; that is, that Edward Hughes and Thomas Williams were not, nor were either of them, seised in their or either of their demesne as of freehold of the property. Issue is joined on that plea, and judgment is for the plaintiffs conclusively, establishing against the defendant the fact that they were so seised of the ancient part of the pool. third plea is still more important. The third plea is, so far as relates to the ancient part of the pool, that at the times, when, &c. the reversion of or in the said part of the said closes, pieces or parcels of land, that is, the ancient pool, did not, nor did the reversion of or in any part thereof belong to the plaintiffs in manner and form as in the declaration is alleged. Issue is joined on that, and the verdict and judgment are for the plaintiffs, conclusively and for ever establishing against the defendant, and all claiming under him, that the reversion was so vested, being, therefore, a fact much stronger against his title and in support of the plaintiffs, than any other verdict and judgment could possi-

THOMAS

JONES.

THOMAS

bly be, because any other verdict and judgment could not be matter of estoppel, which I apprehend this to be. The fourth plea is, that the reversionary estate and interest of the plaintiffs of and in the ancient part of the pool has not been, nor is injured, reduced, or lessened in value in manner and form as alleged. Issue is joined on that plea, and verdict and judgment are for the plaintiffs, conclusively establishing against the defendant that the reversionary interest was not only damaged but injured in manner and form as alleged. That relates only to one portion of the pool, namely, the ancient part, the entire residue of the subject matter in dispute is the new part of the pool, and as to that, the action is in effect confessed in a subsequent part of the pleadings by paying a sum of £25 into Court as the total alleged amount of the injurious damage of which the plaintiffs complained. The verdict and judgment are, that no damage beyond the £25 was done. That fact, therefore, is legally established. I shall presently consider, in a few words, its effect in this Court, but in establishing the fact that no more damage was done than to amount to the £25, the whole record establishes with it, that, by the means and on the acts alleged in this record, injurious damage to the amount of £25 was done; the entire case, therefore, is clearly, so far as it is not confessed, conclusively established against the defendant. In this case, therefore, the right of the plaintiffs to an account and an injunction, whether in the exact words of the bill may be another question, is clear; it is a matter on which it is impossible, as it seems to me, to entertain any reasonable doubt. With regard to the amount of the damage, it has been stated, that this record, viewing it as a formal matter of legal adjudication on the subject, finds the damage only to amount to £25 1s. It would, therefore, ex facie of the record, exclude a matter of account. It has, however, been stated here to me by counsel who were present at the trial, and independently of

the faith due to such a statement, the statement is in itself highly probable according to the ordinary course, that evidence was not gone into with a view to damage; that the case was so opened to the Judge, and so opened on the ground that the action had been taken up by this Court as the means of investigating the disputed matter of fact, and the plaintiffs, as has been truly said, could not help in the case of an action, it not being an issue directed by this Court, the defendant paying the sum of £25 ls. into Court if he chose. Considering, therefore, the action in that light as an action adopted by this Court for that particular purpose, I am of opinion that this Court is not concluded with regard to the amount of damage: I think, however, that it was an error in the plaintiffs to receive the £25, as they intended to come back to this Court, from the defendant, and it therefore will certainly be part of my decree, that, without prejudice to any question of amount, the sum of £25 be immediately repaid, that is, be repaid within ten days after notice, and with liberty to repay it sooner. I shall then direct an account and an injunction in terms which must not be too large, and which must now be considered; and as no substantial observation has been made on the subject of costs. the costs must follow the result, and be paid up to the present time by the defendant to the plaintiffs, reserving subsequent costs.

I have omitted to observe what I had intended to state, that if the defendant had meant to rely on that part of his case stated in the answer, which alleged, that whatever was the title to the soil of the pool, those removals of the soil were justifiable, and justifiable in consequence of the necessity arising from the lower position of the mills, and the exigencies of that establishment; that was matter pleadable, that was matter which ought to have been pleaded, but no such matter is suggested on the record which establishes

THOMAS

THOMAS

that whatever damage was done was damage done unjustifiably and injuriously.

The account must not go beyond that day in October, 1833, which is mentioned in Lord Cottenham's decree.

Let the Master take an account of the quantity and value of the soil, oxide of iron, ochre, shinè, and other, if any other, mineral substance carried or taken away by, or by the order of the defendant, since the 10th of October, 1833, from or out of the pool called Llaethdu Pool, as well the old as the new part thereof, which have been sold or wholly or partially prepared for sale by him, or by his order, or for his use, or on his account, and by the plaintiffs' consent. Let the defendant be at liberty to sell all such of the particulars aforesaid, as he has now ready prepared or in the course of preparation for sale. The plaintiffs having received the sum of £25 ls. as the amount of damages in the action, let that sum be without prejudice within ten days after service be repaid by them to the defendant without prejudice to any question of account in the cause, and the defendant is to pay the plaintiffs' costs of the suit in equity up to this time. injunction will be to restrain the defendant, his agents, and servants, in the usual way, from taking and carrying away from and out of the bed and bottom of the said pool or any part thereof, any soil, oxide of iron, ochre, shinè, deposit or other mineral substance, and from puddling, loosening, disturbing, and floating off, and from causing to be puddled, loosened, disturbed and floated off, any soil, oxide of iron, ochre, shinè, deposits or mineral substances which have already been deposited, or which may hereafter be deposited, upon the beds of the said pool called Llaethdu pool.

The decree to be without prejudice to any application which the defendant may make for any purpose connected with the use or working of the Melin Adda Mills; and let

him be at liberty to make any such application, and let either party be at liberty to apply generally. I do not mean at all to prevent the defendant, if he has the right, from going up the stream for the purpose of keeping the watercourse open. The decree to be without prejudice to any application which the defendant may make in connection with the use or working of the Melin Adda Mills: And let him be at liberty to make any such application, and let either party be at liberty to apply generally; and let the Master be at liberty to state special circumstances. account relates to so singular a subject that it may be of use (a).

1842. THOMAS JONES.

(a) The following case extracted from the 20th volume of Serjeant Hill's MSS., though not cited in the above case, was intended to have been cited, if any argument had been addressed to the Court on the question, whether the Court

would grant a perpetual injunction after a verdict at law, where the verdict was in an action brought by the plaintiff in equity, and not in an issue or action directed by the Court: ---

LIARDET and ADAMS v. JOHNSON and Another.

Decreed by Eyre, Baron, and Masters Graves and Leeds, sitting for In Chancery. Lord Chancellor, at Lincoln's Inn Hall, 5th July, 1780. After T. 20 G. 3. S. C. Bull,

The plaintiff Liardet on the 3rd April, 13 Geo. 3, obtained a patent N. P. edit. for a cement of his invention, and for the exclusive use thereof for the term of 14 years in England, Wales, and the plantations, upon the usual condition that if he, his executors, administrators, or assigns, should not particularly describe and ascertain the nature of his invention, and in what manner it was to be made and applied, by an instrument in writing under his hand and seal, the same to be involled in the Court of Chancery within four calendar months after the date of the letters patent, then the letters patent to determine and be void.

The specification was accordingly inrolled, on the 3rd August following. which was clearly within the time, although the defendant Johnson in his answer made a question on the point.

The patent was assigned by Liardet to Messrs. Adams, 10th May. 1774. Liardet having made some additions or alterations (as was alleged) in the manufacture of the cement, which made it more valuable and more perfect, it was agreed between him and Messrs. Adams, that they should re-assign the patent to him, in order that he might apply to Parliament for an enlargement of the term, and also to extend the exclusive right to Scotland. Such a re-assignment was accordingly made, Liardet at the

5th July, 1780. From Mr. Douglas.

1790, p. 75.

THOMAS
JONES,

same time executing a declaration of the purpose thereof, and covenanting to convey back to Messrs. Adams all the benefit of the letters patent and of the act of Parliament.

An Act of Parliament was accordingly applied for, and obtained 16 Geo. 3, c. 29, by which the exclusive privilege of using and selling the cement as improved was granted for 18 years, from the date of the act, 13th May 1776, and extended to Scotland, still on the condition that a specification of preparing and applying it should be inrolled within four months after the passing of the act.

The new specification was inrolled on the 4th September, 1776, and Messrs. Adams continued to make and sell the cement as before the reassignment to Liardet, allowing him a certain proportion of the profits, as had been agreed upon between them when he first conveyed his patent to them. There had been no new conveyance of the privilege granted by the act according to Liardet's stipulation when this suit was instituted.

In May, 1777, the plaintiffs filed their bill against the defendant Johnson, who had also obtained a patent subsequently to that of the plaintiffs for a cement of a nature very similar, except that he had introduced a new article or ingredient into his composition, and against the other defendants Downes and Bellman, two workmen of Johnson's, setting forth the particulars above stated, complaining that the defendants had evaded their exclusive right, and praying an account and an injunction.

Before the time to answer was out, the plaintiffs having laid an affidavit before the Court stating the most material parts of their case, as above mentioned, and also swearing that they verily believed, that since the passing of the act, and the involment of the specification under it and not before, the defendant Johnson, and the other two as his servants, had made and used great quantities of a cement similar to Liardet's. That they had seen and examined it, and that from such examination they believed it to be made and used according to the invention of Liardet, or on the same principles, with very little addition or subtraction, and mentioning certain houses where they had employed it. And the defendant Johnson, having also made an affidavit which tended both to impeach the novelty of Liardet's cement, and also to prove that what he had used was materially different from it, but which did not directly deny the novelty of the plaintiffs' composition, and counsel having been heard, Lord Chancellor Bathurst, on the 12th June, 1777, made an order that an injunction should issue to restrain the defendant Johnson and his servants from making, using, or vending the composition in question, as prayed by the bill, until the further order of the Court, the plaintiffs undertaking to bring an action at law, and to proceed to trial therein without delay, as soon as the defendants should have fully answered the plaintiffs' bill, but such injunction was not to extend to prevent Johnson from finishing the houses mentioned in the affidavit, which he had begun to cover with his cement, he submitting by his counsel to account in respect of those houses

in case the Court on the hearing should direct an account. The injunction accordingly issued.

1842. THOMAS JOX I.S.

The defendants Johnson and Downes put in several answers in September, 1777, (as did the other defendant Bellman. I suppose though, as no proceedings were had against him, his answer was not stated in the briefs for the plaintiffs). Downes swore in his answer that he had acted merely as the servant of Johnson.

Upon the answers coming in, the plaintiff Liardet, agreeably to the un- Bull, N. P. 76. dertaking under the Lord Chancellor's order, brought an action on the case in B. R. against the defendant Johnson, and, after stating in his declaration the first patent, the act of Parliament, and that in pursuance thereof he had involled a specification of his invention, he charged the defendant by the first count with "making, using, and putting in practice his said invention." By the second, with "making, using, and putting in practice part of his said invention." By the third, with "counterfeiting, imitating, and resembling it." By the fourth, with making, and causing to be made, additions to his invention, whereby to pretend himself the inventor, and for pretending himself the inventor, contrary to the form of the said act.

This action was tried at the sittings after H. 18 Geo. 3, at Westminster Hall, before Lord Mansfield and a special jury, and a verdict was found for the plaintiff.

In Easter term following a new trial was moved for and granted, Lord Mansfield saying, in delivering the opinion of the Court, that it was an action brought in effect by direction of the Court of Chancery, and to be a ground for a perpetual injunction; and that, therefore, they ought to consider whether on the first trial the cause had been so completely discussed and understood as to be a ground for a perpetual injunction. He and the rest of the Court were of opinion that it had not.

The second trial came on at the sittings after Trinity term, 18 Geo. 3. before Lord Mansfield. The defendant produced a good deal of new evidence; but after the trial had lasted from nine in the morning till past eleven at night, the special jury having retired for a very short time brought in another verdict for the plaintiff.

No new trial was moved for after the second verdict, but the plaintiffs in Chancery having replied, the cause was at issue, and the defendants examined a number of witnesses, chiefly those who had been produced by them at the trials at law, with a view to establish the same points on which they had relied before the jury. The plaintiffs only proved the records of the action, and of the two verdicts.

The cause came on to be heard before Mr. Baron Eyre.

Mr. Mansfield, Mr. Macdonald, Mr. Arden, Mr. Thomson, and Mr. Douglas being of counsel for the plaintiffs; and Mr. Maddocks, Mr. Kenyon, and Mr. Mitford for the defendants.

On the part of the plaintiffs it was contended, that the two verdicts ought to be conclusive, that as no new trial had been moved for after the THOMAS

second trial, it was too late to impeach the truth of the last verdict; and that every fact alleged in the declaration, and necessary to support the action, must be taken as proved and found by the jury, and that agreeably to the terms and spirit of the decretal order, granting the temporary injunction, that injunction ought now to be made perpetual. That, if it was competent to the defendants to read any evidence, it could only be such as in a court of law would furnish a ground for granting a new trial, such for instance as new evidence, which not only had not been produced before the jury, but which it was not in the defendants' power to have produced, or evidence to shew misconduct in the jury. That, strictly, it was not for the defendants to impeach the verdict even on such grounds as those in this Court, and in this stage of the cause; for that the proper time and place was within the time allowed by the Court in which the action at law was brought, and in that Court. But that, in truth, none of the depositions for the defendants would be found to be of the tendency just mentioned. That they, in general, consisted of a repetition by the same witnesses of what had been sworn before the jury on the same questions of fact directly at issue in the action; and that the little new evidence they contained (as for instance a patent and specification of one work which they contended to be the same in substance with the plaintiffs) was all accessible to the defendants before the trials at law. That if a court of equity were upon the written depositions of persons, who had or might have been examined and cross-examined before a jury, to draw a different conclusion in point of fact from what the jury had done, it would act in opposition to the general and established principle, that where there are doubts and apparent contradictions as to questions of fact in a cause, the courts of equity are not the proper tribunals for investigating such questions, but ought to send them before a jury, in order to be informed of the truth of them. That if such a principle was applicable on any occasion, it was on this point; for that twelve special jurymen must certainly be much better judges of the nature of such an invention as that in question than a single judge sitting in a court of equity. They, therefore, contended that the defendants ought not to be permitted to send their evidence.

On the part of the defendants it was urged that the Court would never grant a perpetual injunction on a verdict at law; that it will always direct an issue, first, before binding the parties for ever, and for this reason, because the trial and verdict upon an issue are under the control and direction of the Court, which, if dissatisfied with the verdict, may, without the intervention of the court of law, set it aside and direct a new trial. That the verdict, or rather the last verdict, was not conclusive; that it could not be pleaded in a new action, and would only be evidence. That contrary evidence might, therefore, be heard to contradict it, and that, if so, it would appear that the defendants' evidence in the present case most completely contradicted the verdict in the plaintiffs' favour, both as to the novelty of the invention, the fulness and clearness of the specification, and the invasion by the defendants, which three points it was absolutely

incumbent on the plaintiffs to make out before they could be entitled to the relief prayed for. The cases of the Earl of Bath v. Sherwin, Prec. in Ch. 261, and of Lord Pomfret, in the House of Lords, were cited as instances where the Court had refused to grant perpetual injunctions, after several verdicts upon actions at law.

THOMAS

TO JONES.

In answer to this part of the argument for the defendants, it was observed that Lord Cowper, indeed, in the case of the Earl of Bath v. Sherwin, had refused to grant a perpetual injunction after five verdicts in ejectments; but upon an appeal the House of Lords granted the injunction. 1 Wms. 673. That in the case of Leighton v. Sir Edward Leighton, 3 Wms. 673, Lord Parker had granted a perpetual injunction, after three concurrent verdicts in ejectment, although there had been two previous verdicts in favour of the other party. That the reasoning of his Lordship, in that case, was extremely applicable to the present; for he said that, as the two last verdicts had been upon trials directed by the Court, he did not see what the Court had been doing, unless there should now be a perpetual injunction. That here the action and trials must be considered as if expressly directed by the Court; and that, if they were not to be conclusive in any one case, but must be succeeded by an issue, the plaintiff had been deceived by being brought into an undertaking to bring an action, the result of which could not ascertain the right. That the case of Lord Pomfret was extremely anomalous, and could never be a precedent. That, in that case, although it was an action, not an issue, this Court had been moved for a new trial, and the House of Lords, on an appeal, had directed one. N.B. which was perfectly irregular. It seemed to be taken for granted in this cause, by the counsel on both sides and by the learned Judge, that in the case of an action, though brought in consequence of an order of the court of equity, that Court cannot grant a new trial. But this case of Lord Pomfret seems a direct authority to shew that the courts of equity may; for the Court of Chancery entertained the motion, and the House of Lords, sitting as a court of equity, actually granted the new trial. Indeed, if the courts of equity can set aside a verdict on an issue, which is in form of an action, there is no reason why they should not in an action directed by themselves. In the case of an issue, the court of equity will give leave to move the court of law out of which the record goes for a new trial. Hope and others v. Cust and others, Hil. 15 G. 3.

Note.—Some doubts were at first started, how far the record of the action and verdicts could be given in evidence on the hearing, as they did not make part of any of the allegations in the bill; but, upon consideration, those doubts soon vanished, because the terms of the order and the defendant Johnson's answer certainly made them evidence, because he insisted he ought not to account for the profits he had made, until the plaintiffs should have established at law their sole and exclusive right.

On the question of the admissibility of the defendants' evidence, Mr. Baron Eure delivered himself as follows: "Strictly speaking, in the same

THOMAS

point and between the same parties, a verdict is always conclusive. In cases like ejectments it is only evidence, because it does not appear on the record that the point is the same. If those verdicts had been given after the hearing of the cause, they would have been conclusive, but they were given before the cause came on to be heard. I do not see my way in a case so circumstanced. I shall admit the evidence to be read. The operation it may have is a difficult question. As to all those points which may have been discussed at the trial the Court may think it improper to attend to the depositions, and I reserve to myself the fullest liberty on that matter."

The evidence was then read to the effect as above stated, and the defendants' counsel pressed strongly for an issue; and, besides the topics above mentioned, insisted that the plaintiffs' specification was so confused, general, and inaccurate, that it would be impossible for the defendant to know whether, in any cements he might be disposed to use, he did or did not interfere with the plaintiffs and infringe the injunction.

The plaintiffs waived all benefit of account.

Eyre, Baron.—The ordinary relief in the case of a patent is an injunction and an account. When the right is disputed the Court expects that to be ascertained by a trial at law. If such trial has been had and a verdict found for the plaintiff, before the bill is brought, the only question is how is the invasion to be prevented. An injunction in this case is very different from one on bills of peace, or to prevent the bringing of actions. There it is a very extraordinary remedy. It is depriving a man of a right common to all: the right of bringing any claim he may have before a court of law. The sort of injunction here prayed does not deprive the defendant of any right.

If the cause had gone on to a hearing the Court would either have directed an action or an issue, and then the subsequent decision would have been according to the event of the trial.

I conceive there is no difference as to the effect here between an action and an issue. The latter often brings a question more neatly before a jury; it is an incidental difference, that in the case of an issue the Judge makes his report here, and the motion for a new trial is made here, which may be appealed from.

I know not when or how that practice was introduced, perhaps it would have been better if it had never taken place.

The granting the temporary injunction in this cause in the beginning shews what I have before advanced, that an injunction is an ordinary relief in such cases.

How does this, in substance, differ from an action directed upon the hearing? If the cause had come on to be heard, without a previous trial at law, and there had been all the evidence then for the defendants which has now been produced, and evidence also for the plaintiff, the Court would have sent it to law. Suppose there had been, in that case, these

two verdicts, and a long contested trial, and the cause had come on again, whatever might have been the private opinion of the Court, (if indeed they would take upon them to be plasterers), I have no doubt that it would not have healtated to grant the relief prayed for, viz. "An injunction and an account, if there was evidence which would entitle the plaintiff to an account."

THOMAS

JONES.

It seems to me that the case is now the same in substance. Indeed, I think the method which was taken of postponing the hearing till after the trial preferable. As to what has been said, that it will be a hardship to tie the defendant up for ever from making the cement, upon two trials, if the plaintiffs have established their right at law, they are entitled to tie him up. This is not different from other injunctions in like cases.

I do not inquire into the weight and merits of the evidence now laid before me. I am glad I admitted it. I at first thought the verdict conclusive, I do not now think it so conclusive that it could be pleaded; I cannot put a case, where there could be an opportunity of pleading it. But it does not become me in a court of equity on a doubt of mine to impeach it, I am not the proper Judge of the question.

The evidence which has been read only goes to the point of the verdict. If there had been extrinsic evidence, which went to shew any ground for not granting the injunction, the case would be different.

As to the form of the injunction (about which some difficulty had been raised by one of the defendants' counsel), it must necessarily follow the form of the temporary injunction.

I do not know that the injunction will benefit the plaintiffs, because upon an application to this Court on an infringement of the specification, it may be competent to the defendant to shew that what he has done is no infringement, and then perhaps he may be at liberty to produce the evidence which was offered now.

Injunction decreed against Johnson, but without costs.

Bill dismissed as to Downes, with costs.

1842.

April 20th. 21st, 22nd. May 23rd.

and B., the fortune of B.,

which consisted partly of a sum

of money due from C. to D.,

and secured by

the bond of C., was settled on

the intended husband and

wife and their

issue. The bond was not referred

to in the settlement, but the

wife's fortune was therein

stated to have

trustees; and

power was reserved to the

trustees to lend the wife's for-

tune to A., the

husband, on his personal se-

curity. The marriage took

effect, and some

On the marriage of A.

ROSE v. CLARKE.

JOHN HOOD, by his will, devised his real estates to his daughter Isabella, and her heirs, upon trust, with the consent of Dummeller and Lakin, his executors, to sell the estates, and distribute the money arising from the sale amongst his children.

After the death of the testator, and in the year 1806. part of the property was purchased by Joseph Clarke. who had married the testator's daughter Isabella; and Clarke and his father gave their joint bond to secure the amount of the purchase-money, 1705l. 14s., to Dummeller and Lakin.

Mary, another daughter of the testator, married Matthew Rose, and in contemplation of that marriage, the intended wife's fortune, which consisted for the most part of been paid to the her share of the monies arising under the testator's will, and amounted in the whole to 10731., was by an indenture of settlement of the 11th May, 1809, assigned to William Hood and John Rose, upon the usual trusts for the intended husband and wife and their issue. This settlement, to which Mary Hood, Matthew Rose, and the trustees, were

vears afterwards the son of A, and B. filed his bill against C. to recover the money due upon the bond, alleging that C. with knowledge of the existence of the settlement, and that according to its provisions the money ought to have been paid to the trustees, wrongfully paid the money to A., who had wasted it and become bankrupt. In support of the allegation as to C.'s knowledge of the provisions of the settlement, the plaintiff gave some general evidence connecting him with that instrument; as that he was brother-in-law of B., that the parties married from his house, that he was spoken to on the subject of the settlement, that it was prepared by his attorney, and that he was present when it was read over previously to execution; but the bond was not produced, nor was there any proof of its existence, and C., by his answer (which was in evidence), averred that it had been long since satisfied: -Held, under these circumstances, that the plaintiff could not recover from C. the amount of the bond.

An equitable title to money secured by bond is not of itself sufficient to entitle the party interested to sue the obligor in equity for payment of the money.

Before a payment by a debtor to, or under the direction of, his legal creditor, can be impeached or avoided to the prejudice of the debtor, it must be shewn clearly either that the debtor was subjected to the obligation of seeing to some particular mode of application of the money, which was not pursued, or that the debtor having notice of circumstances rendering it inequitable for the legal creditor to receive or direct the payment, could reasonably and with safety have avoided making the payment.

The court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to shew that the original instrument was not stamped.

Quere, whether the mere fact that the plaintiff has filed a replication to the answer of a defendant precludes him from examining that defendant as a witness.

the only parties, stated the 10731. to have been actually paid to the trustees, and it gave power to the trustees to lend the money to the husband on his real or personal security.

Rose E. CLARKE.

Mary Rose died in 1812, leaving issue one son only, namely, the plaintiff, who in February, 1833, filed the present bill, stating the following case: That at the time of the execution of his mother's settlement, the beforementioned sum of 1073l. was in the hands of Joseph Clarke, and that the same or the principal part thereof consisted of money due from him on the before-mentioned bond; and that, although it was stated in the settlement that that sum had been paid to the trustees, yet such was not the case: but that, by concert or agreement between Dummeller, Lakin, the trustees, and Clarke, it was permitted to continue in the hands of Clarke on the security of the bond: that shortly after the marriage, Dummeller and Lakin executed a deed-poll reciting these circumstances, and declaring that 10731., part of the money secured by the bond, was the same sum as had been made the subject of the settlement, and was held by them on the trusts of the settlement: that after the death of Mary Rose, and while the plaintiff was an infant, Joseph Clarke, although he knew that, according to the provisions of the settlement, the money ought to have been paid to the trustees, in order that the same might be invested for the benefit of the plaintiff, paid the 10731. by various portions, at different times, to Matthew Rose, in order to enable him to apply the same to his own use; and that Matthew Rose accordingly did apply the money to his own use, without giving any security for the same: that these payments were made with the privity of Dummeller and Lakin, and that they did not interpose to prevent the making thereof: that Matthew Rose afterwards became bankrupt, and received his certificate without having repaid any part of the money.

The bill further stated the deaths of Lakin and Dummeller, and Hood, one of the trustees under the settlement, probate of their wills by their respective executors, Rose v. Clarks.

the subsequent bankruptcy of John Rose, and the receipt by him of his certificate of conformity.

The bill charged that Dummeller and Lakin colluded with Joseph Clarke to aid Matthew Rose with the payments in question, to the prejudice of the plaintiff while an infant, and that the executors of Dummeller and Lakin, and of the trustees, (the executors of Lakin being Matthew and John Rose,) were bound to apply the assets of their respective testators in making good such payments.

The bill which was filed against Joseph Clarke, the executors of Dummeller, the executors of Lakin, the executors of Hood, and the assignees under Matthew Rose's bankruptcy, prayed that the plaintiff might be entitled to have the said sum of 1073*l*. made good by the defendants, or some or one of them, and by the respective estates of Dummeller, Lakin, and Hood respectively, or one of them, &c.

The defendant, Joseph Clarke, by his answer admitted (and this part of the answer, as far as the asterisk, was read by the plaintiff), that in the year 1806 he had purchased from Dummeller and Lakin certain lands, to secure the purchase-money for which he and his father gave and executed to the vendors their joint bond, but that he could not at that distance of time set forth as to his knowledge, &c. the date of the bond, or the particular sum for which it was given; he, however, stated that he and his father, or one of them, sometime afterwards, and upwards of twenty years ago, duly paid and satisfied, or duly accounted for, the full amount of the principal and interest due upon the bond, and were duly released and discharged from all liability thereon by Dummeller and Lakin; moreover, that he, the defendant, married Isabella, one of the daughters of the testator, and that in right of his wife under the testator's will he became entitled to a considerable sum out of the testator's estate, which sum was not paid to him or his wife by Dummeller or Lakin, or either of them; but the same was, to the best of his recollection, allowed to him in account with them out of the principal and interest secured upon the

bond, as well as some other monies which the defendant. at the special instance and request of Dummeller and Lakin, paid to some of the legatees under the testator's will in respect of their legacies; but to whom in particular, or in what respective amounts, or at what time or times paid, he could not at that distance of time set forth, as to his knowledge, remembrance, information, or belief.\* He denied, to the best of his knowledge, information, and belief, all the other allegations of the bill which materially affected him. He admitted, however, that though he was not acquainted with the contents of Mary Hood's settlement, he knew that such a settlement existed, inasmuch as previously to her marriage she resided with him, and was in fact married from his house. He relied on the Statute of Limitations and length of time.

The defendants, Matthew and John Rose, by their answers, relied on the certificates under their respective bankruptcies as amounting to a discharge of their respective liabilities.

Before the cause came to a hearing Joseph Clarke died; whereupon the suit was revived against Sarah Clarke and Joseph Rice, his personal representatives.

The cause was heard before Lord Cottenham, C., in January, 1840, when his Lordship decreed that it should be referred to the Master to inquire and state in whose hands the sum of 1073l., in the pleadings mentioned, was at the date of the indenture of the 11th May, 1809, and what had since become thereof; with liberty to the Master to state special circumstances.

The Master by his report certified that the sum of 10731. in the pleadings mentioned was at the date of the indenture of the 11th May, 1809, in the hands of Joseph Clarke, and that it was subsequently at different times paid over to the defendant Matthew Rose, and that the last of such payments was made within four years after the date of the said indenture.

Rose v.

Rosa v. CLARKE. To this report the defendants Sarah Clarke and Joseph Rice took several exceptions.

Ä

I

Mr. Russell and Mr. Bird, for the exceptions.

Mr. Wigram and Mr. James Parker, for the report.

Mr. Swanston and Mr. Coleridge, for the defendants other than the exceptants.

The first and second exceptions were taken, on the ground of the Master having received the evidence of Matthew and John Rose in support of the plaintiff's case. Their evidence had been taken under an order which had been obtained by the plaintiff, after decree, to examine them, saving just exceptions. The tendency of their evidence was, in the view of the exceptants, to discharge their testator's estate from payment of the 10731.

For the exceptions.—The plaintiff may examine a defendant saving just exceptions, the defendant being in no way interested in the matter in the suit; but if the plaintiff file a replication, it is no longer competent for him to say that the defendant is in no way interested: Winter v. Kent (a), Hardcastle v. Shafto (b), Meadbury v. Eisdaile (c). [The Vice-Chancellor.—Has the mere fact of filing a replication that effect?] We submit that the examination of the defendant is altogether inconsistent with filing the replication.

But, secondly, supposing this objection to be untenable, can the plaintiff, after the cause has been brought to a hearing, and a decree has been taken affecting all the defendants equally, and power has been given to examine the

<sup>(</sup>a) 2 Dick. 595; see Holmes v. Corporation of Arundel, 4 Beav. 155.

<sup>(</sup>b) 2 Fowl, Pr. 85.

<sup>(</sup>c) Ambl. 817, n., Blunt's ed.; 9 Mod. 438.

parties in the Master's office—can the plaintiff be allowed to say that one of the parties is in no way interested in the suit, and therefore shall be examined for him against the other parties? It would be extraordinary to say that the plaintiff, having made out a case against all, and having taken a decree against all, may examine some of the defendants against whom that decree is open, against the others. The bill has not been dismissed against these parties, nor have they been released.

Rose v. Clarey.

For the report.—Upon the first point, the authorities only go thus far, that, if the plaintiff has replied, he is precluded from examining a defendant on matters in which the latter is interested, and on which he has joined issue with the plaintiff. But this rule does not apply to other matters: Murray v. Shadwell (a).

Then, upon the second point, the claims made by this bill against the several defendants are totally distinct; as distinct as if several bills were filed against them. The bill charges Joseph Clarke with having had the money in his possession, and having wrongfully paid that money to Matthew Rose. The charge against Dummeller and Lakin is, that they were privy to the misapplication by Clarke. Lakin's estate, therefore, is not interested in proving the misapplication. The interest, if any, lies the other way. If so, the party representing Lakin's estate may, upon the principle laid down in Murray v. Shadwell, be examined as to this matter; though, in other matters in the suit, he may be interested. But, even supposing that he was originally interested in this matter, there is evidence that he has administered Lakin's estate: his interest, therefore, is reduced to the mere shadowy interest of a trustee, whose evidence has always been admissible to increase the testator's estate: Fotherby v. Pale (b); Croft v. Pike (c).

<sup>(</sup>a) 2 Ves. & B. 401.

<sup>(</sup>c) 3 P.W. 180; see Hall v. Laver, 3 Y. & C. 197.

<sup>(</sup>b) 3 Atk. 603.

Ross v. Clarks. Mr. Russell, in reply, said that the charges contained in the bill involved all the defendants jointly; and that there was an express charge of collusion between Dummeller and Lakin and Joseph Clarke. He also contended, that the order to examine Matthew and John Rose might exonerate them from costs personally, but not the estate of their testator. In the course of his argument, he cited Bannatyne v. Leader (a).

THE VICE-CHANCELLOR said, that he would reserve his judgment as to the admissibility of this evidence, but, in the mean time, he would receive it *de bene esse* for the purpose of hearing the other exceptions.

The third and fourth exceptions were to the effect, that the exceptants having read certain passages in the answer of Matthew Rose merely for the purpose of discrediting his testimony as contained in his depositions, the Master received the same not only as evidence that that defendant had made the statements contained in the passages so read, but also as evidence of the truth of those statements.

THE VICE-CHANCELLOR was of opinion, that, the exceptants having tendered and used the answer in evidence before the Master, for the purpose stated in the exceptions, the Master was justified in looking at the whole answer; and he overruled the exception.

The fifth exception was to the effect, that the Master had refused to allow the answer of John Rose to be read for the purpose of discrediting the testimony contained in his depositions, unless it was also received as evidence of the truth of the statements contained in the answer.

It was agreed that this exception should be treated as if the answer of John Rose had been actually, like that of Matthew Rose, tendered before the Master. It was also ultimately agreed that the whole answers of both should be considered as tendered and used in evidence for the purpose of discrediting their testimony as before mentioned. The exception, therefore, was overruled. Rose v.

The sixth exception proceeded on the ground that the Master had permitted the exhibit marked D., referred to by the depositions of William Dewes, a witness for the plaintiff, to be read and used as secondary evidence of the deed-poll under the hands and seals of Dummeller and Lakin, set forth in the plaintiff's state of facts (a).

The depositions of William Dewes, in relation to this part of the case, were to the following effect:-That the declaration of trust of the 5th of August, 1809, mentioned in the pleadings, was in his possession, either as successor to Mr. Webster, who was solicitor to Dummeller and Lakin, or as solicitor to the assignees of Matthew Rose and John Rose: that the declaration of trust was not now in the deponent's possession, but it remained in his possession till about 1833, which was the latest period he had seen it; that he had searched for it in his office, and also among the papers in the possession of the assignees of Matthew and John Rose, without effect; that, at present, it was either lost or mislaid; that he had inspected the document whilst in his possession, and that the same purported to be signed by Dummeller and Lakin, whose handwriting he knew, but not to have been sealed and delivered; that it also purported to be attested by a witness, whom the deponent believed to be Webster; that Dalby succeeded Webster in his business of solicitor, and that the deponent, who was an articled clerk to Dalby, succeeded him, and came into possession of the papers of the office, amongst which was the exhibit marked D.; that D. was in the handwriting partly of Webster, partly of Dalby, and partly of their clerks; that the deponent believed that the instrument, of which the exhibit purported to

<sup>(</sup>a) And in the bill; see ante, p. 536.

Rose CLARKE. be the draft, was fair copied and signed by Dummeller and Lakin, and was and became the declaration of trust before referred to; that it was the usual course of business in the office of Webster, for the clerk who copied or engrossed any instrument to indorse a memorandum on the draft of having fair copied the same, whether the fair copy or instrument was or not afterwards executed, and, if the instrument was on a stamp, to express the amount of the stamp also; that, from the indorsement on the exhibit (which was "fair copied 5 Aug. 1809"), and from the charge made by Webster in the handwriting of his clerk Harris, and from a receipt purporting to be signed by Webster, which appeared to have been exhibited in the cause, the deponent thought that the declaration did not bear a stamp.

The charge alluded to by Webster in this deposition was contained in a bill of costs to the amount of 22l. 7s. 10d. made out and delivered by Webster to Matthew Rose; which was produced in evidence. The charge purported to be for drawing and copying declaration of trust by Messrs. Dummeller and Lakin, and attending their signing the same, 1l. 1s.

It was stated, at the bar, that the witness was not in possession of Webster's account books, though it appeared incidentally from the depositions that he had inspected them.

For the exception.—The witness speaks of a paper which, he says, was signed by Dummeller and Lakin, but neither delivered nor stamped. If you take his declaration as to the handwriting of the signature, you must take his declaration as to the rest. Now, there is no evidence that this instrument was ever executed or ever acted on. No communication of it was ever made to Clarke or any other person. Even if it were not intended as a deed, it would, as a declaration of trust, require a stamp(a). But,

in this case, the presumption which ordinarily arises, that the deed was properly stamped (Hart v. Hart (a), Rippiner v. Wright (b),) is rebutted by positive evidence to the contrary. Besides, this document is not a copy, but a mere memorandum, drawn up with a view to something being done afterwards. There is no such proof, therefore, of such a complete and valid instrument having been executed as will allow of secondary evidence being given in respect of it.

Rosm v. CLARKE.

Supposing all other objections to the instrument to be overcome, how can it be made evidence against Joseph Clarke? It is a declaration of trust to which he was no party. It may be a feature in the case to prove the plaintiff's title against Dummeller and Lakin; but what effect has it against Clarke?

For the report.—The presumption is, that the declaration of trust was properly stamped; and the evidence of the witness, who thinks that it was not stamped, is not sufficient to rebut that presumption. In Rex v. Inhabitants of Long Buckby (c), it was held, that, against the negative testimony produced, it was sufficient to set the bare possibility of there being documents affording contrary evidence; yet, in that case, there was no proof of any books being lost. Here there is a reasonable probability of the charge for a stamp having been made in some other account. The witness has not in his possession Webster's books; but he has seen them. Besides, there is a possibility that this instrument was afterwards stamped by the trustees. [The Vice-Chancellor.-Have you shewn that they paid the penalty?] The Court will presume that the trustees did their duty. In the case in East, the Court presumed a breach of duty in a public officer rather than presume no stamp.

THE VICE-CHANCELLOR.—It may be doubtful whether, upon the other grounds which have been taken indepen-

(a) 1 Hare, 1. (b) 2 B. & Ald. 478. (c) 7 East, 45.

Rose v. CLARKE. dently of the question upon the stamp, this exhibit ought to be received in evidence. Upon the question of the stamp, it is admitted that at the period when the instrument of which this is suggested to be a copy was signed, if signed, it required by law a stamp; and it is admitted, that, supposing the Court to be satisfied that it was not stamped, this which is alleged to be a copy of that instrument cannot now be received in evidence.

Now the case stands thus:—a witness produced by the plaintiff, who is acquainted with the practice of the office of ' the solicitor in which this instrument was prepared, states that it was the practice, when any deed which was engrossed was stamped, to make a minute of the instrument having been stamped. Now, the paper produced contains an indorsement of its being a fair copy of the instrument in question, but there is no memorandum of its having been stamped; and under all the circumstances, the inference drawn by the plaintiff's witness upon this subject is, that there was no stamp. But the case does not rest there: it appears that when Mr. Webster, in whose office the instrument is stated to have been prepared, died, he left several books in which he had kept his accounts. No evidence has been given of the contents of those books. A bill of costs, however, which appears to have been made out by Mr. Webster, has been produced by the plaintiff, the total amount of which was about £30, and in which there is a charge for drawing copy, and attending signature of the original of this instrument, but the bill contains no charge for a stamp. Under such circumstances it is impossible for the Court to presume that the instrument was stamped; it is impossible not to presume that it was unstamped. The evidence as it stands throws the burden on the plaintiff to shew that the instrument was stamped. I must reject the exhibit.

The case was then heard on the 7th and 8th exceptions, (which involved the merits of the cause), and on further directions. The purport of these exceptions was, that the Master ought to have certified that the plaintiff by his state of facts had admitted that the sum of £1073 was, at the date of the settlement, in the hands of Dummeller and Lakin upon the security of the bond of the Clarkes, but that no other evidence had been produced before him to shew in whose hands the money then was; and, further, that the Master ought to have certified that no sufficient evidence had been produced before him to shew what had become of the money since the date of the settlement.

Rose v. CLARKE.

In support of the Master's finding the depositions of Mr. Dewes and others were read (the latter being directed principally to the search for the lost instruments), and those of Matthew and John Rose were read de bene esse (a). whole of the depositions of the Roses taken together affirmed the allegations of the bill. Several of their statements, however, were not evidence, and that part of them which tended to affect Joseph Clarke with notice of the contents of Mary Hood's marriage settlement was by no means precise; the principal grounds of the deponents' belief on this subject being, that Mary Hood was married from Clarke's house; that Webster, Clarke's solicitor, was employed to prepare the settlement; that Clarke had had one or two communications on the subject of the settlement with the deponent Matthew Rose, and that he was present when the settlement was read over before the marriage. Upon this part of the case, Dewes stated that he had never any communication with Clarke on the subject, but that Webster prepared the settlement. Neither the bond of the Clarkes nor the declaration of trust was produced.

The material part of Joseph Clarke's answer, part of which was read for the plaintiff, has been already stated (b).

In the course of the argument, Thompson v. Harrison (c) was cited.

<sup>(</sup>a) See ante, p. 540. (b) See ante, p. 536. (c) 1 Cox, 344.

Ross E. CLARKE. May 23rd. THE VICE-CHANCELLOR.—In this case, argued upon exceptions and further directions during the last term, I reserved my judgment, having however, as to the sixth exception, stated my opinion to be in favour of it for reasons which it is unnecessary to repeat: and I expressed also an opinion, that in any event there ought not to be any costs of the exceptions on either side, and that the deposit should be returned.

In the course of the argument it was admitted, that the defendants Matthew Rose and John Rose had obtained their certificates before they were examined in the Master's office, and an arrangement was made between the counsel for the plaintiff and for the defendants Clarke and Rice, by which they agreed that subject to the question of admissibility of the evidence of Matthew Rose and John Rose respectively, their answers should be considered to be part of the evidence before the Court, as evidence which the defendants Clarke and Rice, after the Master had overruled their objections to the admissibility of Matthew Rose and John Rose, and without waiving those objections, tendered before him for the sole purpose of discrediting their evidence, that is of course the answer of Matthew to discredit his testimony, and the answer of John to discredit John's testimony; and as evidence, upon that tender, received by the Master, without prejudice to the objections taken to the admissibility of the witnesses.

In this position the case now stands for judgment, as well upon the exceptions, or all of them except the sixth, as upon the further directions.

The plaintiff having asked at the bar relief only against the defendants Clarke and Rice, and waived, so far as without prejudicing the rights which he asserts against them he can waive, any relief against the other defendants, it is only requisite to consider the matter in dispute as it stands between the plaintiff and the defendants, Sarah Clarke and Joseph Rice, who are parties to the suit as the personal representatives of Joseph Clarke, originally a defendant, who

was not living when the cause came on before Lord Cottenham.

Rose v. CLARKE.

The plaintiff is the only child of a marriage between Matthew Rose (the defendant and witness already mentioned) and Mary Hood, which took place in the year 1809. He sues as interested in that character under the settlement dated 11th May, 1809, which was made on the occasion of the marriage, alleging that a sum of £1078 money settled by it, which belonged to Mary Hood, was at that time in the hands of Joseph Clarke, secured by a bond from him and his father, to two persons called Richard Dummeller and Nathaniel Lakin; alleging farther, that Joseph Clarke after the settlement, and with notice of it. wrongfully paid the money to Matthew Rose, with the knowledge and privity of Dummeller and Lakin; and contending that under the circumstances the bond-debt cannot be treated as discharged in equity, and must now be paid by Joseph Clarke's estate.

His Honor then read the material parts of the settlement and proceeded thus: ]-Joseph Clarke was the brotherin-law of Mary Hood, having married her eldest sister. Mary Hood appears to have married from his house. must be taken to have been at this time aware, at least in a general way, of the nature and amount of her fortune; and that there was a settlement, though it might possibly be going too far to consider it satisfactorily proved that he was fully or accurately acquainted with its contents. But, however this may have been, the settlement does not mention or refer to Joseph Clarke, or any bond or debt from The money, which is the immediate subject of the settlement, is in explicit terms stated by it to have been before its execution paid by her into the hands of the trustees of the settlement, namely, John Rose (the defendant already mentioned) and William Hood. The reading of this instrument, therefore, would certainly not shew that any money due from Joseph Clarke to Dummeller and Lakin was, if in fact it was, intended to be affected by it. ميلسوب

Rose v. Clarke. It is unnecessary to repeat, that neither Joseph Clarke nor Dummeller nor Lakin was a party to the settlement. I may here state that the plaintiff's mother, Joseph Clarke's father, and William Hood, the trustee, as well as Dummeller and Lakin, died before the institution of the suit.

[His Honor then read the passage from Joseph Clarke's answer, before set out (a), and the principal statements in the bill, and proceeded thus:]—I do not find that the bill alleges the bond to be lost, mislaid, or destroyed, or alleges it to be in the possession or power of Joseph Clarke. I may here observe also, that the accident of his decease cannot give the plaintiff any greater or better equity in this suit than the plaintiff otherwise would have had, and that, as I apprehend, an equitable title to money secured by a bond is not of itself sufficient to entitle the party so interested to sue the obligor in equity for payment of the money. There must, I conceive, be something more.

The bond is not, and has never been, forthcoming in this suit. Whether it is in existence is uncertain, and the information which the Court has of its nature and contents is defective. But probably it was a common money-bond from Joseph Clarke and his father to Dummeller and Lakin, not containing any notice of an equitable title to any part of the money secured by it, though possibly it may have described them as the executors or trustees of the will of Mary Hood's father.

Some evidence chiefly formal was entered into previously to the hearing of the cause before Lord Cottenham. He probably thought that the deposition of Marshall to the fifth interrogatory did not contain anything material as against Joseph Clarke or his estate, and that the residue of the depositions before his Lordship (so far as tending to prove anything in dispute) was scarcely of more account. Such certainly is my view.

[His Honor then read the decree, the report, and the

exceptions, and proceeded thus: ]-The Master, it appears from what has been stated, had before him evidence taken after the hearing, as well as that taken previously. the evidence taken subsequently to the hearing, it is only necessary to refer to portions of the depositions of the defendant Matthew Rose, the defendant John Rose, and Mr. Davis, neither of whom had been examined previously. [His Honor then read portions of their depositions, and proceeded: - Now as to the declaration of trust mentioned in these depositions, if it was executed by Dummeller and Lakin, it is certainly not proved that that fact was ever brought to the knowledge of Joseph Clarke before he paid the money in question. The settlement of itself would not preclude Dummeller and Lakin, who were not parties to it, from enforcing the bond-debt of Clarke, or directing Clarke to pay it as they chose. They might have arrested him upon it: and before a payment by a debtor to or under the direction of his legal creditor can be impeached or avoided to the prejudice of the debtor, it must be shewn clearly either that the debtor was subjected to the obligation of seeing to some particular mode of application of the money, which was not pursued, or that the debtor, having notice of circumstances rendering it inequitable and improper for the legal creditor to receive or direct the payment, could reasonably and with safety have avoided making the payment. Has this been done here? It appears to me, on the whole case, that I must in this suit take the bond to be, and at the time of the commencement of this suit to have been, incapable of being successfully put in suit at law: secondly, that neither fraud nor collusion has been established against Joseph Clarke, the obligor: thirdly, that the whole amount due upon the bond must, for the purposes of this suit, be taken to have been actually paid by him, either to the obligees, or with their knowledge and consent: fourthly, that, as against Joseph Clarke or his estate, it is not satisfactorily proved that the obligees ought not or were bound in equity not to have received or con-

Rose 9. CLARKE. Rose 8. CLARKE.

sented to the payment: fifthly, that if they acted improperly in receiving or consenting to the payment, or if the money, after having been paid, was not applied as it ought to have been, there is still no satisfactory proof that Clarke when he paid it was so affected and circumstanced as to render the payment void in equity as to him, or was under the obligation of seeing to any particular mode of applying the money after it had been paid. If these conclusions are, as I believe them to be, correct, there is an end of the suit. And I have arrived at them, upon a review of all that is before me, assuming the Master to have properly received all the evidence that he did receive. Had I therefore considered the sixth exception as proper to be overruled, and not allowed, my decision upon the residue of the cause would be what it now is; nor, in my view of the whole merits is there any necessity to decide, and I therefore abstain from deciding, whether the Master was or was not right in admitting the evidence of Matthew Rose and John Rose, or either of them. I think it immaterial to the substance of the case whether their testimony is to be considered as wholly admitted, wholly rejected, or partially admitted and partially rejected. If their evidence was well admitted, it is still for the Court to judge of the weight belonging to it, having due regard to all the circumstances. I have carefully considered their depositions, especially on the third interrogatory. It was right that I should do so, without forgetting their date—the time of Joseph Clarke's death—the state in which the cause came on to be heard before Lord Cottenham—the frame of the bill—the answers of Joseph Clarke, and the other particular circumstances. The result is, that these depositions, if evidence, are evidence to which, in my judgment, I cannot attribute any weight. I may add, that if the fact of the 1078l. being in Joseph Clarke's hands, bound by the trusts of the settlement, existed and was known to him, and he was aware of the particulars of those trusts, he was aware that the trustees were authorized to advance the whole money to

Matthew Rose on his personal security, or to apply it for the sole use of his wife.

1842. Rose CLARKE.

I have not omitted to compare the depositions on the third interrogatory with the interrogatory itself, which contains this question.—"Whether or no did the said William Hood and John Rose consent to such payment or payments." The question is not answered. It is, in my opinion, avoided; and the depositions of both John and Matthew (though that of Matthew contains the word "privity") are, as I conceive, consistent with the fact of the whole money having been paid to Matthew with the consent of the trustees.

On the whole, the order which I make upon the exceptions and further directions is this:---

The counsel for the plaintiff having waived any relief in this cause against any of the defendants other than Sarah Clarke and Joseph Rice. save such relief as may be necessary in order to obtaining relief against Sarah Clarke and Joseph Rice in this suit, and the Court being of opinion that whether the exceptions or any of them are or are not good or sufficient in law, the plaintiff is upon the whole case not entitled to any relief against Sarah Clarke and Joseph Rice; -let the bill be dismissed as against all the defendants, other than Sarah Clarke and Joseph Rice, without prejudice to a new bill, and as against the defendants Sarah Clarke and Joseph Rice absolutely. And let the deposit be returned to them.

It is not a case for costs. What I now do will not, I apprehend, prejudice, nor do I intend that it should prejudice, any suit which the personal representatives of the surviving obligee may think fit to institute at law or in equity against the representatives of Joseph Clarke.

## HUDSON v. MARTIN.

MR. MONTAGU moved, under the 8th of the Orders of Practice in this August, 1841, for leave to enter an appearance for the defendant.

THE VICE-CHANCELLOR said, that, with a view to prevent gust, 1841, althe serious consequences which might otherwise arise to a

Dec. 16th.

Court as to entering an appearance under the 8th of the Orders of AuHUDSON U. MARTIN.

defendant, he had on former occasions thought it desirable, and also competent to the Court within the terms of the order, to direct an intermediate service of a copy of it to be made on the defendant before it was strictly carried into execution against him (a). It had come, however, to his Honor's knowledge that the Lord Chancellor had taken a different view of the construction of the order, considering it imperative on the Court. His Honor thought that the Lord Chancellor was most probably right in his construction; but even if it were otherwise, the practice of the Lord Chancellor must regulate the practice of this Court. His Honor therefore made the order as prayed.

(a) See ante, p. 203.

PIDGELEY v. RAWLING.

April 18th. Upon the construction of a will, comprising a mixed fund of realty and personalty:-Held, that certain persons were not legatees in remainder of the residue, but postponed pecuniary legatees, and therefore that they were not necessary parties to a suit for the administration of the testator's assets.

JOHN MOORE PIDGELEY by his will, after devising certain real estates and certain chattels to his son and daughter, gave, devised, and bequeathed all the residue of his real and personal estate to trustees, upon trust to raise and set apart out of his residuary real and personal estate the sum of £3000, and pay the interest thereof to his daughter for life, for her separate use, and, after her decease, to divide the capital between her two children Emma and Eliza, who were to take vested interests at twenty-one; the issue of either, dying under twenty-one, to take the parents' prospective share; and in case both should die under twenty-one, without leaving lawful issue, the sum so directed to be raised to go in the same manner as the testator had thereinafter directed concerning the residuary real and personal estate. The testator then directed his trustees to raise and set apart in like manner two sums of £500 and £500 for the benefit of his said two grand-chil-

2. Har 352

dren and their issue, with a like proviso in the event of their dying under twenty-one, without leaving issue. The testator then devised and bequeathed all the residue of his real and personal estate upon trust for his son for life, with remainder to his children attaining twenty-one, as tenants in common, or the issue of children dving under twentyone, with remainder in favour of his daughter and her children, in case his son should leave no children or issue taking vested interests. And in case the testator's son should not have any child which should live to attain twenty-one, or should die under that age leaving lawful issue, and the two children of his said daughter should both die under that age without leaving lawful issue, and not otherwise, the testator gave sums of £500 and £100 to the defendants Henry and William Rawling, who were the executors and trustees of the will, and also, as the bill stated, certain charitable and other legacies; and subject to the aforesaid charges, he directed his trustees to stand seised of his real estates, upon trust to sell the same, and divide the proceeds of the sale amongst the several persons named in the will.

PIDGELEY

8.

RAWLING.

The bill was filed by the testator's son against the executors, and the several persons interested in the residue of the testator's estate, praying that the will might be established and the trusts of it carried into execution, and for accounts of the testator's real and personal estate, and for the administration of his estate, &c.

Upon the cause coming on for hearing-

Mr. Wilbraham (with whom was Mr. Moore), for the executors, insisted that the legatees of the "charitable and other legacies" ought to have been made parties to the suit, they being, as he contended, legatees in remainder of the residue.

Mr. Russell and Mr. Follett, for the plaintiff.

PIDGELEY

8.

RAWLING.

Mr. Tripp for other parties observed, that the objection if ever tenable was cured by the 80th of the Orders of August, 1841, this being a mixed fund of realty and personalty.

THE VICE-CHANCELLOR said, that it was not necessary to resort to the New Orders to decide this point. He was clearly of opinion that these were merely postponed legatees, and not legatees in remainder; and he overruled the objection.

April 30th. May 2nd.

Specific performance of an agreement refused, the same not having been accepted by the plaintiff in due time, nor any accept-ance by him ever notified to the defendant, and the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms.

Quære, whether a court of equity will enforce the specific perform-

## THORNBURY v. BEVILL.

THE plaintiff, who was an attorney, had carried on his business in Chancery-lane for some time previous to the 7th of July, 1838, at which time, he being in ill health, an arrangement was entered into on his behalf with the defendant Charles Bevill, under which the latter was to assist him in managing the business. An agreement in writing, dated the 7th of July, 1838, was accordingly drawn up and signed by the parties, or on their behalf, whereby it was agreed that the business should in future be carried on solely by the defendant, in the name and under the firm of Thornbury & Bevill; and that the clear profits thereof should, at the expiration of each year, be divided equally between the parties. In pursuance of this agreement, the defendant entered upon the sole conduct and management of the business, and continued to carry on the same under the firm of Thornbury & Bevill.

ance of an agreement, that, upon the retirement of a solicitor from a copartnership, the remaining partner shall carry on the business in the name of the retiring partner.

Quere, whether the signature of an attorney to a statement at the foot of a draft agreement, signifying his approval of the draft on behalf of his client, is a signature within the Statute of Frauds.

Disputes having afterwards arisen between the parties, which led to an action, and Mrs. Thornbury, who was the sister of the defendant, having instituted proceedings in the ecclesiastical court against the plaintiff, these matters were proposed to be made the subject of an agreement, of which the draft was to the following effect, viz.:—

1842.
THORNBURY
v.
BEVILL.

That all further proceedings in the action should be stayed; that the suit commenced in the Prerogative Court be discontinued; that the agreement, dated the 7th of July, 1838, be delivered up to be cancelled on the following terms—viz. that the partnership thereby created should be put an end to and determined, and that the business at 16, Chancery-lane, should belong exclusively to Mr. Bevill, who, in consideration thereof, agreed as follows; to allow yearly during the life of Thornbury, determinable on the death of Bevill, the clear sum of £60, to be paid to him by equal half-yearly payments, for securing which Bevill was to execute such deed as should be agreed upon; that Bevill should also pay to Mrs. Thornbury "the yearly sum of £40 during the life of the said George Thornbury, determinable on the death of the said Charles Bevill, or as long as she shall conduct herself to the joint satisfaction of the said Charles Bevill and Thomas Kirk (the plaintiff's solicitor), in full discharge of any claim to marital rights which she may have upon the said George Thornbury." Then followed provisions for the apportionment between the parties of the partnership profits to the 7th of July, 1838, and that Thornbury should permit and suffer Bevill to use his name and carry on the business under the firm of Thornbury & Bevill for such time as Bevill should think fit, Bevill giving to Thornbury such indemnification as should be settled upon between the solicitors of the parties; and that Thornbury should enter into the same covenants and penalties as were contained 1842.
THORNBURY
9.
BEVILL.

in the agreement of July, and were entered into on his behalf.

This draft agreement having been drawn up by the plaintiff's solicitor, Mr. Kirk, was sent to the defendant's solicitor, Mr. Thorndike, who, having introduced certain alterations, returned it to Kirk with the following memorandum, signed by him at its foot:—"I approve this draft, as altered on the part of Mr. Bevill; but, if objected to, the part relative to the annuities and business must stand over—A. S. Thorndike, 30th November, 1839." The draft so altered was subsequently signed, as approved by Mr. Kirk, on behalf of the plaintiff, but, when it was so signed, did not appear in evidence, except that it was some time before the institution of the suit.

On the 2nd of December, the plaintiff's solicitor sent to the defendant's solicitor two drafts, purporting to be fair copies of the draft which had been returned by the latter, but with the omission of a penalty clause, and, as alleged by the defendant, with some other variations. On the following day, the defendant himself having re-altered the copies so as to make them correspond with the original draft agreement, as previously approved by his solicitor, retained one, and returned the other to the plaintiff's solicitor, accompanied with the following letter, written by the defendant:—" Dear Sir,—Myself and Thornbury. The duplicate of the inclosed has been signed by Mr. Thorndike, and is in my possession. Yours truly, Charles Bevill."

On the 30th of December, the plaintiff's solicitor delivered to the defendant another fair copy of the draft agreement in the form in which it had been signed by Thorndike, for the purpose of having such fair copy signed by Thorndike, and retained for the plaintiff's use as an original copy. The plaintiff's solicitor also, on the 2nd of January, 1840, delivered to the defendant's solicitor a draft deed of dissolution of the partnership for his approval.

1842.
THORNBURY
9.
BEVILL.

On the 11th of January, the defendant's solicitor wrote to the plaintiff's solicitor as follows:—" Dear Sir,—Bevill & Thornbury. I have perused the draft deed of dissolution of partnership, which, I conceive, is not conformable to the arrangement you suggested for the settling the differences between these parties. Circumstances have also transpired which militate against the probability of the business producing a sufficient profit to enable the resident partner to pay an annuity of £100, so that he has come to the determination of quitting the business at the expiration of six months, pursuant to a notice to be hereafter given. I am, &c., A. S. Thorndike."

On the 21st of January, the plaintiff's solicitor having in the interim written to the defendant's solicitor, requesting to know whether it was intended to return the draft, and proceed to complete the arrangement, the defendant's solicitor returned the draft deed and the copy of the draft agreement, accompanied by the following letter:-- "January 21st, 1840. Dear Sir,-I cannot alter that part of my letter relative to the draft; and am still of opinion, that its contents are not consistent with the arrangement we suggested for the settling the differences between these parties. I now return you the draft deed with the agreement sent for my signature, referring you to my first letter on the subject. I beg to inform you that Mrs. Thornbury complains of that part of the arrangement which reduces her income. As my client considered that he was acting in every way for her benefit, he now feels much annoyed at the part she has taken, and finds that he has no authority to execute any document relating to her."

The plaintiff now brought his bill for the specific performance of the agreement, either according to the terms of it, or with such variations as the Court should think fit. 1842.
THORNBURY

S.
BEVILL.

The defendant, by his answer, insisted that the plaintiff, by altering the copy of the agreement as signed by Thorndike, had waived the benefit of it, if it ever had subsisted as a legal agreement; and that even if the plaintiff had at any time subsequently acquiesced in the alterations made by Thorndike, he had never expressed his willingness to execute the agreement within a reasonable time; and, further, that Mrs. Thornbury's objections rendered it impossible for him to perform the agreement.

In support of the plaintiff's case, James Fluker, clerk to the plaintiff's solicitor, stated generally, that the assent of the plaintiff to the agreement, as altered by the solicitor of the defendant, was fully notified to the defendant.

The Law List of 1840 was also produced on behalf of the plaintiff, with the view of shewing that the name of Thornbury was, in pursuance of the agreement, omitted from it, and that of Bevill only inserted in that year's List.

On the part of the defendant his solicitor stated, that no person on behalf of the plaintiff had ever informed him that the plaintiff agreed to the alterations made by the de\_ ponent in the draft agreement; and that no offer was at any time made by the plaintiff to sign the agreement as altered by the deponent. And Thomas Morris, a clerk to the defendant's solicitor, after stating that he had attested the signature of Thorndike to a copy agreement between the plaintiff and the defendant, which copy had been altered by the deponent by the orders of the defendant himself, stated as follows:--" After the said copy agreement had been so signed by Mr. Thorndike, I went by the direction of the defendant, Mr. Kirk, to know if he were prepared to exchange the agreements executed. The said Mr. Kirk said, that he had sent the said agreement to Mr. Thornbury for his approval; and that when he received it back, the defendant should hear from him. I afterwards went several times to the said Mr. Kirk, but I could not obtain the said duplicate agreement from him."

The defendant's counsel likewise produced in evidence a copy of the draft deed of dissolution of partnership (having previously given notice to the plaintiff to produce the original), in which several variations from the draft agreement appeared; as, that notice of the dissolution should be given in the Gazette; that the defendant should indemnify the plaintiff against future rent, &c.

Evidence was also given for the defendant of Mrs. Thornbury's objections to the terms of the agreement.

Mr. Simpkinson, and Mr. Dixon, for the plaintiff.—It is clear, so far as the defendant is concerned, that he signed the agreement. The draft was signed by his solicitor. Thorndike. The fair copy must at all events be taken to have been signed by himself; the signature being recognised by his letter of the 3rd December. The cases go much further than the present: Coleman v. Upcot (a), Palmer v. Scott (b). [The Vice-Chancellor.—It has been settled by several cases, that if the agreement be in the form of a proposal, in order to bind the party who made it, it must be accepted in the very terms of it; and be accepted in good time: Kennedy v. Lee (c)]. That the plaintiff accepted it in good time, is shewn by Kirk's approbation at the foot of the draft which was returned approved by Thorndike, and by what took place between the parties as to the fair copies. The exclusion of the penalty clause from these copies, by Kirk, is immaterial; as it was afterwards inserted in both the fair copies of the defendant himself, and also inserted in the draft deed. Then it is clear, from Fluker's evidence, that the assent of the plaintiff was communicated to the defendant. The facts which he states lead inevitably to that conclusion. Under these circumstances, the plaintiff could not afterwards have turned round and said, that he had

THORNBURY

O.

BEVILL.

<sup>(</sup>a) 5 Vin. Abr. 527, pl. 17. (b) 1 Russ. & M. 391. (c) 3 Mer. 441.

1842.
THORNBURY
v.
BEVILL.

not assented to the agreement, even though it contained the penalty clauses. How, then, is the defendant excused? Acting upon the agreement, the plaintiff takes his name out of the Law List, and the certificate is taken out in the name of the defendant alone.

But secondly it will be said, that the agreement is inva-Upon that point, the observations of Lord Eldon, in Candler v. Candler (a), apply. In Bunn v. Guy (b), it was decided that such a contract was not illegal; and that case was cited with approbation, or at least was not disapproved, in Armstrong v. Lewis (c). The stipulation in the present case, is not that the business shall be carried on in the names of Thornbury and Bevill, but only amounts to a permission for its being so carried on. Such agreements are not only legal, but of daily occurrence. They are not injurious to the clients of a firm; because a client having transactions with the firm, would always consult one member of the firm, and would necessarily know that he had retired from the firm. It would not be like the case of a banking-house.—[The Vice-Chancellor referred to Lord Eldon's observations in Baxter v. Conolly (d), as to the sale of a goodwill.]—In this case the partnership existed before, and it was not therefore a mere sale or assignment of the goodwill.

Bozor v. Farlow (e) will probably be cited on the other side. In that case, however, the document contained only a prospectus of the intended agreement. One of the clauses was for a transfer of the whole business, another that the deed should contain all usual clauses, which left the clauses uncertain. Nothing of that kind occurs in the present case. No observation arises on the fact of the agreement amounting to a transfer of clients and professional business; for the transfer had actually taken place two years

<sup>(</sup>a) Jac. 228.

<sup>(</sup>c) 2 C. & M. 274.

<sup>(</sup>b) 4 East, 190; 1 Smith, 1. See

<sup>(</sup>d) 1 Jac. & W. 576.

<sup>4</sup> B. & C. 190.

<sup>(</sup>e) 1 Meriv. 459.

before, Thornbury having had nothing to do with the business during the whole of that period. Candler v. Candler shews that the doubts of Lord Eldon had been removed. In Bunn v. Guy the party was to relinquish and make over the whole of the business. Lingen v. Simpson(a). Lastly, the objection on the part of the wife is not a ground for the Court refusing to execute the rest of the contract.

1842.
THORNBURY

C.
BEVILL

In the course of the argument the *Vice-Chancellor* inquired whether there was any case in which specific performance had been decreed on signature of approval of the draft only.

Mr. Swanston and Mr. Whatley, for the defendant.— There is no evidence of the contract of which the plaintiff seeks a specific performance. The bill alleges that the draft was settled and approved, and that the alterations were made by Mr. Thorndike. The bill, however, does not point out the alteration.

Supposing the memorandum to be the contract, when was it binding on the parties? They say Mr. Thorndike assented to it, but by what document? There is no evidence of any binding agreement before the 11th January. The document purports to be a proceeding in another Court, and Mr. Bevill could not by any means make it a rule of Court. The cases cited do not apply where the party who has signed the contract repudiates it before any proceedings are taken upon it.

Supposing the defendant to have been bound by the contract, he was at liberty, at any time before it had been acceded to by the plaintiff, to withdraw from it: Martin v. Mitchell (b); Routledge v. Grant (c); 1 Sugd. V. & P., vol. 1. p. 85.

(a) 1 Sim. & S. 600. (b) 2 Jac. & W. 413. (c) 4 Bing. 653.

THORNBURY

S.
BEVILL.

In the course of the argument the Vice-Chancellor referred to Doe v. Pedgriph (a), and Stokes v. Moore (b).

Mr. Simpkinson, in reply.—It can hardly be contended that a signature to an approval of a draft is not a signature within the Statute of Frauds. Cases have gone so far, that the mere attesting the instrument as a will, provided it be shewn that the person attesting was aware of the consequences, is binding on him, within the statute: Welford v. Beazeley (c). This, however, is a signature, not to the original draft, but to a fair copy. Then the question is, whether the difference between the parties, as to the penalty clause, annuls the effect of the agreement in tuto.

THE VICE-CHANCELLOR.—Having in vain recommended an amicable settlement of this case, and having had an opportunity of considering the pleadings and evidence out of Court, I do not think it necessary to put the parties to the inconvenience of delaying my judgment.

A draft containing the terms of the alleged agreement was undoubtedly signed by the defendant's solicitor. It was sent, so signed, to the plaintiff's solicitor. While in his possession, the plaintiff's solicitor also signed his approval of it: but when he signed it, although examined as a witness in the cause, he does not state; except that it was signed before the institution of the suit, the bill being filed in 1840; a circumstance which cannot but attract attention. Nor is it suggested in the evidence, that the fact of the plaintiff's solicitor having so signed his approval of the draft, was ever communicated to the defendant or his solicitor.

<sup>(</sup>a) 4 Car. & P. 312.

<sup>(</sup>b) 1 Cox, 219.

<sup>(</sup>c) 1 Wils. 118; 3 Atk. 503; 1 Vez., sen. 6.

This draft, thus sent by the defendant's solicitor to the plaintiff's solicitor, is, so far as that term can be properly applied, copied by the plaintiff's solicitor or his clerk; but it was not strictly copied, for variations, by no means immaterial, were introduced. This copy, if it can be so called, for it is admitted to vary from the original, is sent on the part of the plaintiff's solicitor to the defendant's solicitor. The defendant rejects the alterations, and restores the paper to a state corresponding with the original draft; and, in that altered state, sends it back to the plaintiff's solicitor on the 3rd of December, with the following letter. [His Honor read the letter as before stated.] Now, upon the facts which I have stated, and the whole aspect of the case, it must be taken, that up to this time there was no agreement between the parties; because both parties had not agreed to any set of terms. Up to the 3rd of December, when the letter which I have just read was sent, the whole rested in pro-Now it may be, that if there had been an acceptance of the agreement by the plaintiff in the state in which it was placed or replaced by Bevill, or on his behalf-an acceptance communicated to the defendant clearly, unequivocally, and without unreasonable delay-it may be, that the result would have been an agreement binding on the I do not, however, find any evidence that it parties. This was on the 3rd of December: no step is Was so. taken by the plaintiff till the 30th of December; on which day, the draft of a deed for carrying the agreement into effect, was sent by the plaintiff's solicitor to the defendant's solicitor;—a draft varying, as it seems to me, in more than one respect from the last state of the paper previously existing, to which I have already alluded. His Honor then read the evidence of Morris, and proceeded as follows.] From the evidence, therefore, it appears, that up to the 30th of December, when this draft was sent, nothing had passed which could bind the plaintiff to the terms of the paper that Thorndike had last signed; and if there were

1842.
THORNBURY

U.
BEVILL.

1842.
THORNBURY
9.
BEVILL

nothing more in the case, it might possibly be considered, that to enforce an agreement under those circumstances. against the defendant, would be dealing hardly with him. It appears, however, that a short time afterwards, namely, on the 11th of January, the following letter, which I must consider as repudiating the agreement, and putting an end to the treaty, was written by the defendant's solicitor to the plaintiff's solicitor. [His Honor read the letter as before stated.] The first question therefore is, whether, on the 11th of January, the conduct of the parties was such as to preclude the defendant Bevill from saving. "I will have nothing more to do with this arrangement: I consider it at an end." I am of opinion, upon the evidence, that if any thing had been signed on the part of Bevill which would have bound him, had it been acceded to, he was entitled, by the letter of the 11th of January, to withdraw, and that he did withdraw, from the arrangement. I think, therefore, that on that ground I could not enforce specific performance against him. If, however, this difficulty, which seems to me insurmountable, had not existed, I might still have felt considerable embarrassment in decreeing specific performance of this paper, if it were an agreement, or an agreement continuing in force; for the first provision of it is, that the suit commenced in the Prerogative Court shall be discontinued. Now in that suit, Mrs. Thornbury was the plaintiff; and this is a contract sought to be enforced against the defendant, the object of which is, to compel her to do an act which she refuses to do. But that is not all. There is so much obscurity in the agreement, with regard to the time during which the 401. per annum was to be paid to Mrs. Thornbury, as to create a further difficulty in the way of a decree for the plaintiff. Nor am I sure, that a still further difficulty might not arise in enforcing the transfer of the business which this agreement provides for. This is not quite a case of dissolution of partnership, but something between

a dissolution of the partnership and a purchase of the business: and notwithstanding the case of Bunn v. Guy, from which I do not mean to express dissent, decided as it was by Judges of high authority, I am not prepared to say, that it is fit that a court of equity should enforce an agreement between two solicitors, that one on retiring from the business shall permit the other to carry on the business in his name. Whether such an agreement be or be not within the strict policy of the law, it may be doubtful whether this Court ought to assist it. I do not, however, rest my decision on that ground; I mention it that it may not be thought that I see no difficulty in that part of the case. The bill must be dismissed, but it is not a case for costs.

1842. HORNBURY 97. BEVILL.

## SLADE v. PARR.

THOMAS SLADE by his will gave and bequeathed to Legacies to the his executors £10,000, Navy £5 per cents., upon trust as to name) of the £1000, part thereof, for John Slade, son of his late niece Mary Slade, wife of his cousin Robert Slade, to be assigned or transferred to him, when and as soon as he as soon as they should attain his age of twenty-five years, for his own use absolutely. The testator then made similar bequests of the residue of the stock in sums of £1000, £1000, £1000, £1000, £1000, £2000, and £2000, in favour of Eliza, Mary, Robert, Sarah, James, Thomas, and Anna, the other chil-

April 27th.

children (by testator's late niece M., to be assigned to them, when and should respectively attain twenty-five. Provided that if any should die under twenty-five leaving issue, the issue to take the parents' legacy, but if any

should die under twenty-five, without having issue then living, the legacy of the child so dying to go and be paid to the " survivors and survivor, and others and other" of the same children, in equal shares. At the death of the testator, all the children of M. are under twenty-five. All afterwards attain twenty-five, except A., who dies under that age without issue, having survived two of the children, B. and C. The share of A. devolves to the representatives of B. and C., together with the children who survive A.

Upon the construction of a will, keld, that the surplus dividends of a legacy, after payments for

maintenance during the minority of the legatee, go with the corpus.

SLADE v.

dren of his niece Mary Slade; and as to the interest, dividends, and annual produce arising from the said respective legacies so given to the children of Mary Slade, deceased, from the first payment after his decease, until the legatees, to whom the same should respectively belong, should attain their respective ages of twenty-five years, in trust to pay to or permit and suffer Robert Slade, their father, to have, receive, and take the same in trust for the legatees to whom they respectively should belong, and to be paid and applied by him for and towards the support, maintenance, education, and advancement in life of such legatees respectively, in such manner and form as he, the said Robert Slade. and in case of his death, the trustees for the time being, should in his or their discretion think proper; such payments of the interest and dividends to be made half-yearly. the testator directed that the surplus money (if any) arising from the interest, dividends, and annual produce of the respective legacies, after such payment and application as aforesaid, should be retained by the said R. Slade or the trustees, as the case might be, for the respective legatees to whom they should respectively belong, and to be paid to' them respectively with their respective legacies upon their respectively attaining the age of twenty-five years. Provided, nevertheless, that, in case any one or more of the children of the testator's late niece, Mary Slade, should die under the age of twenty-five years, leaving issue one or more child or children, such child or children should take the legacy or legacies which his, her, or their parents would have been entitled to, as well original as accruing, if he, she, or they had lived to attain that age, if more than one in equal shares; but in case any of the children of Mary Slade should happen to die under the age of twenty-five years without having issue then living, then the legacy or legacies of him, her, or them so dying, as well original as accruing, should go and be paid to the survivors and survivor, and others or other of the same children, Mary

Slade, and if more than one, in equal shares, his, her, or their executors, administrators, and assigns. And the testator appointed Robert Slade and Thomas Parr, both since deceased, to be the executors of his said will.

SLADE 0.

The testator died in October, 1816. The executors proved the will, and set apart the stock for the purposes of the trusts. Robert Slade, the father, after surviving his co-executor Parr, and appointing other persons co-trustees with himself, died in March, 1833, leaving those co-trustees surviving him, in whose names the stock was now standing.

At the death of the testator, the children of Mary Slade were all living, and all under the age of twenty-five. They all afterwards attained the age of twenty-five, except Anna, who died under that age and unmarried in March, 1889, having survived John, Mary, and Eliza.

The question was, who was to take the original share of Anna, and also the surplus of the interest and dividends of her share after deducting the sums expended in her maintenance.

Mr. Temple and Mr. Freeling, for the surviving brothers and sisters of Anna, submitted that, as to the capital of Anna's share, this case was distinguishable from Wilmot v. Wilmot (a), and that those children were excluded from all interest in her share, who died before her, though they attained twenty-five. Supposing, however, the Court should hold otherwise, were the representatives of those children entitled to share the surplus dividends of Anna's share? [The Vice-Chancellor.— No doubt the surplus goes with the capital.]

Mr. Anderdon and Mr. Teed appeared for other parties.

THE VICE-CHANCELLOB .- The letter and the spirit of the

SLADE 0. PARE.

will go together. The spirit and intention of the will is, that these legacies should vest upon the children attaining twenty-five, or dying under that age leaving issue. The testator has said, that in case any of the children of Mary Slade should die under twenty-five without having issue then living, the legacy or legacies of him, her, or them so dving (which must include the surplus dividends) should go and be paid, not to the survivors and survivor only, but to the survivors and survivor and "others and other" of the children. The argument for the plaintiffs is, that the legacies are to go to the survivors and survivor only, and not to the others and other. I am of a different opinion. It is not necessary to say what might have been the case had any of the children attained twenty-five before the testator's death. That circumstance does not occur here. Anna's share, therefore, is divisible amongst all the children who attained twenty-five, including those who died before her (a).

(a) For recent cases, in which the question has been raised, whether the words "survivors" in a will should or should not be construed in the sense of "others,"

see Cromek v. Lumb, 3 Y. & C. 565; Cursham v. Newland, 2 Beav. 145; Leeming v. Sherratt, 11 Law Journ., N. S., 423.

CONSETT v. BELL.

PETER CONSETT, by his will, dated the 27th July, 1837, gave, devised, and bequeathed all his freehold, copyhold, and leasehold estates, in the county of York and elsewhere, unto and to the use of John Bell, Thomas Stubbs Walker, and Thomas Meynell, their heirs, executors, administrators, and assigns, upon trust during the term of twenty-one years, to be computed from the testator's death. to receive the rents and profits of the premises, and from time to time to lay out and invest the same in their names in two specified in the public funds, or upon real securities, and to receive and re-invest the dividends and interest thereof, so as to form an accumulating fund in the nature of compound interest: and as to the freehold premises, subject to the said term, in trust for the plaintiff for life, without impeachment of waste (except as to timber, which should only be cut down for necessary repairs, and in nowise to the injury of the instrument, any plantation or ornamental timber), with remainder in trust for his first and other sons severally and successively ecution of it in tail male, with divers remainders over in favour of the thenceforth un-

1842.

May 28th & 30*th*.

A. executed an instrument purporting to convey to B. all the household furniture, plate, watches, clocks, books, monies. securities for money and other effects. which at the time of A.'s decease should be rooms in his mansion-house. except an iron chest and its contents, and the contents of a certain closet. A. lived almost exclusively in the two rooms mentioned in and B. at the time of the exand from til A.'s death,

was his bailiff and confidential agent. Two years after the date of this instrument, A. made his will, by which he bequeathed his plate, jewels, household furniture, and money to trustees, upon certain trusts for the benefit of C. and his issue. In a suit for the administration of A.'s estate, B. claimed the benefit of the prior instrument, but without either producing probate of it or shewing for what consideration or under what circumstances it was executed :- Held, that if the instrument was to be considered as testamentary, this Court could not act upon it without probate, and that if it was to be considered as a deed inter vivos, this Court would not give effect to it without further evidence in its support. And this Court being of opinion, that under the circumstances of the case, such further evidence could not be obtained, declined to direct any inquiry on the subject.

A person having a claim against a testator's estate prevailed upon the executors to hand over to him part of the testator's assets under circumstances from which he must have known that in so doing the executors were acting hastily, improvidently, and against their duty as executors:—Held, that such person was a proper party to a suit instituted by a legatee against the executors for the administration of the estate, although the bill contained no charge of collusion or insolvency.

A person appointed by will receiver of the testator's real estates with a salary, is a proper party to a suit for the administration of those estates.

Upon a bill filed by an infant devisee for life, without impeachment of waste (except as to ornamental timber), praying the establishment of the will, the administration of the trusts, and maintenance, an inquiry was directed as to timber in the form adopted in Tooker v. Annesley. 5 Sim. 235, excluding ornamental timber.

The Court, under the circumstances of a case, declined to entertain an objection for multifariousness at the hearing.

Consett v. Bell.

younger brothers of the plaintiff as tenants for life, and their issue. And the testator directed that his copyhold and leasehold estates should be held upon trusts similar to those declared of the freehold estates, or as near thereto as the different tenures of the estates and other circumstances would permit. And notwithstanding the trusts for accumulation, the testator empowered the trustees, out of the rents and profits of the freehold premises, to expend such sums as they should think necessary in the repairs of his mansion-house at Brawith, and the gardens and buildings belonging thereto, and also in the payment of fines for the renewal of leases. And he gave and bequeathed all his ready money and money in the funds (subject to the payment of his debts) to his trustees, their executors, &c., upon trust to invest the same in the purchase of freeholds, to be settled upon the same trusts as the freeholds thereinbefore devised. And he bequeathed his plate and jewels. and all the household furniture and utensils which should be in and about his mansion-house at the time of his decease to the same trustees, their executors, &c., upon trust to permit the same to be had and enjoyed by the person for the time being entitled to the real estates, to the intent that as far as the rules of law would permit the same might be as heir-looms. The testator then, after directing that the trustees of his will should have £100 a year each during the said term of twenty-one years, directed that Benjamin Wilson should be receiver of all his real estates during that term, at a salary of £100 a year, with power to the trustees to audit his accounts, and to appoint a new receiver in case of his dying, or declining or becoming incapable to act, And the testator appointed the trustees above named to be executors of his will.

The testator died on the 7th December, 1839, and a few months afterwards his will was proved by the executors.

The testator was a man of retired habits, and had for

some time previously to his death confined himself almost exclusively to the occupation of two rooms; namely, his bed-room, and what he called his workshop. He managed his affairs principally with the assistance of Benjamin Wilson, the person named in his will, who received his rents, and was otherwise much in his confidence.

On the day of the testator's death Wilson informed the executors of their appointment, and they accordingly, on the same day, went to the testator's bed-room and took possession of his will. They then proceeded to the workshop and secured a gold watch and some money of the testator. Wilson then produced a deed, under which he laid claim to certain articles of furniture, and to the sum of 8461. 18s. 10d. The deed bore date the 26th September, 1835, and was made between Peter Consett of the one part, and Benjamin Wilson of the other part, and witnessed that, in consideration of the services performed by Wilson for Consett, and in further consideration of 10s., the said Consett bargained, sold, assigned, transferred, and set over unto the said Wilson, his executors, administrators, and assigns, all and singular the household furniture, silver plate, watches, clocks, time-pieces, china, glass, printed books, monies and securities for money, and other effects of what nature or kind soever of him the said Peter Consett, which at the time of his decease should be situate and lying in and upon the rooms of his dwelling-house then occupied by him at Brawith aforesaid, commonly called or known by the names, or occupied by him as his bed-room and workshop, save and except a certain iron chest then standing and being in the bed-room aforesaid, and its contents, and also saving and excepting the contents of a certain closet situate in the workshop aforesaid, commonly called or known by the name of the plate closet, and all the right, title, interest, property, benefit, claim, and demand whatsoever of him the said Peter Consett in and upon the said effects and premises, to have, receive, and

CONSETT S. BELL.

CONSETT 5.
BELL.

take all the said household furniture and other effects and premises thereinbefore mentioned and intended to be thereby assigned unto him the said Benjamin Wilson, his executors, administrators, and assigns, for his and their own absolute use and benefit, without any lawful let, suit, denial, claim, demand, interruption, and eviction whatsoever, from or by any person or persons whomsoever claiming or to claim by, from, through, under, or in trust for him the said Peter Consett, his heirs, executors, or administrators, or by, with, or through his or their, or any of their act or acts, means, consent, privity, or procurement.

The executors not considering that the deed was fraudulent, or obtained by undue influence, and therefore supposing that Wilson was entitled to the property comprised in it, paid over to him, on the 10th December, the beforementioned sum of 8461. 18s. 10d., part of which, namely, the sum of 8111. 18s. 10d., was in a bureau in the workshop, and the remaining sum of £35 consisted of monies found loose in the bed-room and workshop. Wilson also, with their consent, took possession of various articles of furniture, and removed them from the bed-room and workshop.

The executors, afterwards conceiving themselves in error as to what had passed between them and Wilson, requested him to refund the money, and to deliver up to them the articles. This he refused to do.

The bill was filed by William Warcop Peter Consett, an infant, who was the first tenant for life of the estates devised by the will, but for whose maintenance no provision had been made by the will, against the trustees, the coheirs at law of the testator, and Benjamin Wilson. The bill, after stating the foregoing facts and suggesting that various repairs should be done to the devised premises, and also that it would be for the benefit of the estates that some part of the timber should be felled, and charging that the proceeds thereof should be applied for the benefit of the parties interested under the will, prayed that the will might

be established, and the trusts thereof carried into execution, and that proper directions might be given as to felling the timber, and as to the repairs, and also as to the renewal of leases, and that a proper sum might be allowed for the plaintiff's maintenance out of the rent and income of the testator's estate, or otherwise out of the dividends to be produced by investment of the proceeds of the timber which might be cut down, and that the deed of the 26th September, 1835, might be declared to be void, or else testamentary and revoked by the will, and that Wilson might be decreed to repay to the trustees the sum of 8461. 18s. 10d., and to re-deliver to them the furniture which had been removed by him, and for an account of the personal estate received by the trustees.

The bill contained various general charges of fraud and undue influence against the defendant Wilson, which were struck out by amendment.

The defendant Wilson, by his answer, insisted that the bill was multifarious, and that he was improperly made a party thereto, and claimed the same benefit of objection as if he had demurred.

Upon the cause coming on for hearing,-

THE VICE-CHANCELLOR, after declaring the will to be established, and directing various inquiries which were not opposed, observed that the inquiry as to timber should be taken in the language adopted in *Tooker* v. Annesley (a).

The cause was then heard as to that part of it only which concerned the defendant Wilson.

In support of his case, the defendant Wilson proved the deed of September, 1835, by the subscribing witnesses, both of whom were persons in an humble station of life. He also proved by the evidence of the housekeeper, that the deed was delivered by the testator to Wilson some time in 1835, together with the keys of the two rooms, the keys

CONSETT 6.

CONSETT 6.

of every chest and box therein except the iron chest and plate closet, and a pencil-case; the testator at the same time declaring that he thereby gave possession at his decease of every thing in the rooms, except the contents of the iron chest and plate-closet (a). It was also stated by this witness and by another female servant, that the testator usually kept his bank-notes in the iron chest, and such part of his money as consisted of gold and silver in the bureau. The latter witness also stated, that two days previous to the testator's death Wilson entered the bedroom in the presence of the witness, with two keys in his hand, and said that he had brought up the rents; upon which the testator directed him to take the key of the bureau out of his waistcoat pocket, and to place the money in the bureau, which Wilson accordingly did.

It was not shewn by whom the deed was prepared, or for what services or under what particular circumstances it was given.

Mr. Wigram and Mr. Wilcock, for the plaintiff.—Supposing the deed to have any legal effect whatever, it cannot pass the money in the bureau, unless it be shewn that at the time the money was placed there, the testator, who was in extremis, knew that it would be affected by the deed; Wilford v. Bulkley (b). This instrument could not, as a deed, pass a future contingent interest in chattels. As at common law chattels pass by delivery only, the only mode in which the deed could operate in futuro would be as a testamentary instrument; but in that case it ought to have been proved: Ousley v. Carroll (c); Habergham v. Vincent (d); Masterman v. Maberly (e). Besides, the confidential relation in which the parties stood to each other precludes the defendant Wilson from setting up this deed

<sup>(</sup>a) See Jones v. Selby, Prec. Cha. 300, in which the same kind of delivery of chattels occurred.

<sup>(</sup>b) 2 Cl. & Fin. 102.

<sup>(</sup>c) 2 Vez. sen. 440.

<sup>(</sup>d) 2 Ves. jun. 231.

<sup>(</sup>e) 2 Hagg. Eccl. Rep. 235.

in a court of equity: Dent v. Bennett (a); Griffiths v. Robins (b); Huguenin v. Baseley (c); Popham v. Brooke (d); Hunter v. Atkins (e).

CONSETT V. BELL.

Mr. Russell and Mr. Stevens, for the defendant Wilson.— The money was paid to Wilson without fraud or collusion: and if there be any case against him, it is not a case to be dealt with by a court of equity. If the money in his hands was part of the testator's assets, he has received it from parties dealing with the will, who were competent to bind the estate. If the paper is testamentary, how is it shewn to be revoked by the subsequent will? But it is immaterial to the defendant to inquire whether it was a deed or an instrument requiring probate. The executors have relieved him from the effect of such inquiry by their own acts. It is a settled rule, that a party claiming a residue in the testator's estate cannot go against a party holding the assets, unless he prove collusion between the executors and that party. If a person is overpaid, the creditor cannot go against him, but must proceed against the executor, unless perhaps the executor is insolvent: Alsager v. Rowley (f); Beckford v. Dorrington (g); Bowsher v. Watkins (h); Pearse v. Hewitt (i).

But the money in question is not part of the testator's assets: it is severed from them by the deed. Although the defendant had taken it without the consent of the executors, he might have barred them at law. Interests in personal existing chattels (not choses in action) may pass by deed: Irons v. Smallpiece (k). What the testator meant to pass was, all that was then in the bureau, and all that should be there at the time of his death. If there should

- (b) 3 Madd. 191.
- (c) 14 Ves. 273.
- (d) 5 Russ. 10.
- (e) 3 Myl. & K. 131.
- (f) 6 Ves. 748.

- (g) Id. 749; West Ca. temp. Hardw. 169.
  - (A) 1 Russ. & M. 277.
  - (i) 7 Sim. 471; see Lancaster
- v. Evors, 4 Beav. 158.
- (k) 2 B. & Ald. 554; see Lang ton v. Horton, 1 Hare, 549.

<sup>(</sup>a) 4 Myl. & C. 269. See Middleton v. Sherburne, 4 Y. & C. 358.

CONSETT V. BELL. be any difficulty in holding that the deed operated upon what was subsequently there, there is equal difficulty in holding that the testator was not bound by estoppel. The form of the gift shews that it was the testator's intention to avoid the legacy-duty.

Lastly, the bill is multifarious. It has two distinct objects: to carry the will into execution, and to compel Wilson to pay this money. Wilson, however, is not concerned in the former object, having no interest in the testator's estate, either legal or equitable. [The Vice-Chancellor.—He is appointed by the will receiver of the real estate: Shaw v. Lawless (a).]

Mr. Swanston and Mr. W. Milne, for the trustees.

Mr. Heberden, Mr. Sandys, Mr. Harrison, and Mr. Cator, for other parties.

Mr. Wigram, in reply.

THE VICE-CHANCELLOR.—In this case the only points in dispute are those which concern the defendant Wilson, who is a party to the bill as interested in the real estate of the testator in the cause, under the trusts of the will, which it is an object of the suit to administer, and as interested also under a deed or instrument of September, 1885, impeached by the bill, purporting to be an assignment from the testator to him, either immediately or so as to take effect from the testator's death, of some personal property of which this defendant has, since the testator's decease, had possession delivered to him by the executors, under that alleged title.

Mr. Wilson's counsel have contended that the bill is, as to him, multifarious. If it is so, I am not bound at this stage of the cause, and do not think that, under the circumstances of the case, it would be convenient or useful to accede to the objection. I need not, therefore, decide the point.

It is then said, that he has not such an interest under the will as renders him a necessary or proper party to the suit, as a suit for administering the trusts of it.

This point also it is not necessary now to decide, seeing that, in my opinion, he is properly a party on the other ground mentioned. As to the instrument of 1835, it has been suggested that it may be of a testamentary character. If it is testamentary, I cannot act upon it, or treat it as affecting personal property, for it has not been proved in any ecclesiastical court. If it ever could have been, it may now, I apprehend, be tendered for proof and proved in that jurisdiction. When, if ever, that shall be done, it will be competent to this Court to deal with it in that cha-If it is not testamentary, has it any legal or equitable validity, especially as to the sum of 8461. 18s. 10d., or 8111. 18s. 10d., to which the plaintiff's counsel has confined his claim against Mr. Wilson? There is no reason to suppose that, independently of this deed or instrument, his antecedent services to the testator were gratuitous or not remunerated, or that the testator was under any obligation to do what it purports to make him do, or that the instrument was in satisfaction of any debt from the testator; I must therefore consider it as voluntary merely, and therefore not to be aided in a court of equity, even if there were no positive equitable objection to it. This is not immaterial,

On the question of its legal validity, I am not satisfied that, as an assignment, as a covenant, or otherwise, it passed any legal interest, or conferred any legal title. If, however, it were material in my view to pass any judgment upon the instrument, considered as an instrument intervivos, it might possibly be right to afford the means of taking the opinion of a court of law upon it; but it appears

although I agree that Mr. Wilson does not require the aid of a court of equity, but is a defendant and not a plaintiff, and, in fact, is in possession of all that he claims, or has

ever claimed, under the document.

CONSETT v. BELL.

CONSETT 5.
BELL.

to me, that in whatever light that jurisdiction might view the document, the judgment to be pronounced by me must be substantially the same. Merely, therefore, intimating an opinion, that probably as to the sum in question, the instrument of September, 1835, is not, and never was, of any value for any legal purpose, I proceed to state, that in this Court Mr. Wilson cannot, as I conceive, be allowed to set it up for any purpose whatever. That it was voluntary is not all: exhibiting no trace of good advice, marked with a strong character of improvidence, it was obtained by a confidential agent from his principal, for the benefit of the agent himself, who is now asking a court of equity to support it, or to stand neutral concerning it, in the total absence of any evidence to shew under what or whose instructions, or under what circumstances, or with what degree of explanation, information, or knowledge, it was prepared and executed. I say with Lord Eldon and Lord Cottenham, that a man, who engages in a transaction such as this, takes upon himself the burthen and obligation of clearly proving that it is fair and righteous. This defendant has not discharged himself of that burthen or obligation. It is impossible for me to suppose that a person of ordinary prudence or discretion, properly advised, would have knowingly executed this instrument as an act inter vivos, containing as it does the words "monies and securities for money," without any power of revocation. It is equally impossible for me, in the state of the evidence before me, to allow it to stand, with regard, at least, to the sum in question. Nor do I think that, either on general principles or with reference to the particular case, I ought to direct any further investigation into the circumstances. It has not, indeed, been suggested, nor do I think it probable, that an inquiry would produce any further information at all material.

It may be true that the bill does not quite accurately represent, so far as it does represent, the circumstances

connected with the transaction. I am, however, of opinion, that the defendant was not and could not have been misled by the mode in which the case is stated on the record. which is, in my judgment, substantially sufficient in point of pleading, both in matter of fact and law. Mr. Wilson, however, contends, having received the property from the executors, that the plaintiff is bound by their acts, so far at least, that if he can complain, it is only against them; and that the plaintiff is within the operation of the general rule preventing a mere legatee from suing a stranger indebted to the estate, or holding part of the assets. To this objection, however, I cannot accede. Mr. Wilson obtained possession of the fund in question within less than a week after the testator's death; with the executors' assent, it is true, but with a full knowledge of the nature and circumstances of his own title, with notice, I must take it, of the will, and that the executors, in consenting to the demand, were acting hastily, improvidently, and not in conformity with their duty to the infant cestui que trust. If these things are so, can I permit him, because the executors are solvent, to say that possession thus acquired was well acquired in equity, and is not affected by a trust or title in favour of those for whom they were trustees? If the term delictum is applicable, can I treat the executors and Mr. Wilson as in pari delicto? Supposing them not entitled to recover, can I doubt who ought to be made first liable to the party wronged-he who, with no rightful claim, has actually possessed the property, through mistake induced by his own erroneous allegation of right, or those who have honestly, though hastily, improvidently, and in error, parted with it to him? Without disputing the doctrine laid down by Lord Hardwicke in the case of Alsager v. Rowley, that doctrine, and every case of authority decided with reference to it, are, in my opinion, clearly consistent with giving the plaintiff in this case the relief which is asked by the bill.

COMMETT

CONSETT v. Bell. THE plaintiff by his next friend waiving any relief in respect of the matters contained in the schedule to the answer of the defendant Wilson, declare that the defendant Wilson did not become rightfully entitled to the sum of 8461. 18s. 10d. in the pleadings mentioned, and is bound to refund the same, with interest, from the time of filing the bill, for the benefit of the persons beneficially interested in the testator's estate. Let the defendant pay into court the said sum within a month, with interest at the rate of £4 per cent. from the time of filing the bill, the amount to be verified by affidavit, to be laid out to accumulate.

## DRANT v. VAUSE.

Under a lease for years, the lessees had an option to purchase the fee simple of the demised lands. After the date of the lease, the owner made his will, whereby he devised the lands, specifically describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee simple of the lands :-Held, upon the special terms of the will, that the purchasemoney did not fall into the residue of the personal estate. but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life interest in the purchase-money.

GEORGE DRANT, the testator in this case, by a lease, dated 20th September, 1827, demised certain freehold property at Sculcoates, in the county of York, to T. and R. I. Sisson for a term of fourteen years, with a covenant therein that they should have the option, at any time during the term, of purchasing the fee-simple of the premises at the price of £2000. By his will, dated the 17th March, 1831, without noticing the lease, he gave, devised, and appointed unto his friends Richard Vause and Thomas Kennington, their heirs, executors, administrators, and assigns, all his messuages or dwelling-houses, cottages, warehouses, lands, tenements, hereditaments, and real estates whatsoever in the parish of Sculcoates and other specified places, and all other his freehold and copyhold hereditaments of which he or any person or persons in trust for him was or were seised or entitled, or should be seised or entitled, at the time of his decease, to hold the same unto the said trustees, their heirs, executors, administrators, and assigns, according to the respective nature of such estates, but, nevertheless, upon the trusts thereinafter expressed and declared; that is to say, upon trust out of the rents and profits of the real estates and the interest and income of the personal estate, or out of the personal estate itself, if his trustees should think proper, to pay such sum or sums

of money as, at the testator's decease, should be due on mortgage of his real estates, and all other his debts, funeral and testamentary expenses, and, after payment thereof, should stand seised of certain specified parts of the estates in trust for his, the testator's, daughters, Mary, Susanna, Sarah, and Margaret, and his son William, who was his heir-at-law; and, as to another specified part thereof, in trust to receive and take the rents and profits thereof, so long as his son George Drant should live and be under the age of twenty-one years, and, when he should attain that age, upon trust to permit him to receive the rents and profits thenceforth to arise from the said last-mentioned premises for and during his natural life; and from and after his decease, the testator gave and devised the said last-mentioned premises unto all and every the children or child of the said George to be equally divided between or amongst them, if more than one, as tenants in common in tail, and in default of such issue he gave and devised the same unto and equally amongst all his, the testator's children, who should be then living, their respective heirs and assigns for ever. And as to, for, and concerning his residuary personal estate, he gave and bequeathed the same equally between his children upon their attaining twenty-one.

The premises comprised in the indenture of demise of the 20th September, 1827, formed a portion of the property devised by the testator to his son George.

No option to purchase was declared by the lessees until after the death of the testator, when, upon being advised that no valid conveyance could be made to them of the premises, except under the decree of the Court, they filed their bill against the executors and the children for the specific performance of the covenant for sale contained in the lease. This was decreed accordingly, and the money was paid into Court in that suit.

The present bill was filed by George Drant against the

1842.

DRANT V. DEANT S. VAUSE.

executors and the other children of the testator, for the purpose of determining the question, whether the money in Court in the other suit was subject to the same limitations as had been declared in the will concerning the land sold, or whether it formed part of the testator's general residuary estate.

Mr. Thomas Turner, for the plaintiff, submitted that the purchase-money was subject to the same limitations as had been declared of the estate by the will, and that therefore the plaintiff was entitled to the interest of it for his life.

Mr. Amphlett, for the other children of the testator, contended that the money must be considered as forming part of the residue. He cited Lawes v. Bennett (a), Townley v. Bedwell (b), Knollys v. Shepherd (c), Forrester v. Lord Leigh (d), Mirehouse v. Scaif (e).

THE VICE-CHANCELLOR said, that in Lawes v. Bennett the will was expressed in very general terms, and Lord Kenyon, at the commencement of his judgment, adverted to that circumstance. Here the will was in very special terms. Without therefore meaning to suggest the slightest doubt as to the soundness of the decision in Lawes v. Bennett, his Honor was of opinion that the testator having, in the present case, madespecific mention in his will of the estate which had been previously the subject of the lease, the general rule established by the authorities did not apply; but that the purchase-monies were subject to the same limitations as had been declared concerning the estate itself.

<sup>(</sup>a) 1 Cox, 171.

<sup>(</sup>d) Ambl. 171.

<sup>(</sup>b) 14 Ves. 591.

<sup>(</sup>e) 2 Myl. & C. 679.

<sup>(</sup>c) 1 J. & W. 499.

1842.

BURRIDGE v. Row.

THE facts of this case, and the arguments and judgment at the hearing, have been already reported (a).

The plaintiffs, Mr. and Mrs. Burridge, now presented their petition praying that the sum of 4811. 19s. 9d., Consols, which, under the decree in this cause, had been carried to a particular account, might be retained by the trustees of the plaintiffs' marriage settlement, upon the trusts of that settlement, until full satisfaction should be made to them of the sum of £5000, to which, as such trustees, they were entitled by virtue of the bond of Alderman Winchester.

In consequence of the observations which fell from the Court on a former occasion (b), the assigness of Row were served with notice of this petition, and appeared, but discuttement until claimed all interest in the fund in question.

Mr. Simpkinson, Mr. Russell, and Mr. Wetherell, for the respect of W.'s bond for £5000

Mr. Brigge, for the assignees of Row.

Mr. Cooper (with whom was Mr. Walford) for the assignees of Alderman Winchester.—The doctrine of retainer, or set-off, which has been applied by the Court to the £5992, Three per cent. Bank Annuities, does not apply to the £431 Consols. The former sum was acquired by the trustees in their character of trustees, and was originally affected by the trusts of the settlement; the latter sum came to them by an accident, and was never part of the trust fund. The reasons, therefore, for setting off the former sum against the £5000 trust money due on Alderman Winchester's bond, do not apply to the sum of

May 31st.

A.'s assignees having, under the circumstances stated antè, p. 183, disclaimed in Court all interest in the £431 Consols:-Held, that the trustees of the settlement havpossession of that sum in the character of trustees, were tain such pospurposes of the settlement until full satisfaction should be made of what was due to them in bond for £5000.

<sup>(</sup>a) Antè, p. 183.

BURRIDGE V. Row. £431 Consols. The right of set-off, in these cases, must arise out of the same instrument, or, at all events, out of the same transaction. If the trustees could not retain this fund against Row's assignees, how can they do so against the assignees of Winchester?—Whitaker v. Hall (a), Ex parte Whitaker (b), Rawson v. Samuel (c), White v. O'Brien (d), Corsbie v. Free (e), and the other cases cited antè, p. 190.

THE VICE-CHANCELLOR.—The assignees of Row, with notice of the decree in this cause, and with knowledge of the reasons of the Court for pronouncing that decree, have appeared on this petition as parties respondents, and have deliberately disclaimed all interest in the subject in dispute. They are therefore out of the question.

Certainly, however, the doubt, which from the beginning I have entertained, whether the assignment from them to Winchester passed such title, if any, as the assignees of Row had vested in them in any part of this fund, has not been removed. If that doubt is well founded, the assignees of Winchester have no interest whatever in the fund now in question. Under the circumstances, however, it is not necessary to express a conclusive opinion on that point. I will leave it open, and assume for the present that that deed did pass such interest, if any, as the assignees of Row had in the dividend fund. It cannot be said that the trustees obtained the dividends which composed that fund by concealment or fraud, though it is possible, in the events which have occurred, that there may be, or has been, a right in Row's assignees to recover back a proportion. They, however, as I have already mentioned, have disclaimed; and assuming that Winchester's assignees have the right which Row's assignees had, still the dividend fund must be treated as having come to the hands of the

<sup>(</sup>a) 1 Gl. & J. 213.

<sup>(</sup>d) 1 S. & S. 551.

<sup>(</sup>b) 1 Rose, 301.

<sup>(</sup>e) Cr. & Ph. 64.

<sup>(</sup>c) Cr. & Ph. 161.

trustees in that character. If it was in that character alone that they claimed, and if proof was made by them in that character, then, whether the dividend fund was included in Alderman Winchester's purchase or not, it must be liable to the same conditions as the policy fund, except as to the liability to make good the premiums paid by Alderman Winchester. Therefore—

LET all parties have the costs of this petition out of the corpus of the fund in question, and let the residue of the fund be treated in the same manner as the policy fund, except as to the liability to make good the premiums.

1842. BURRIDGE Row.

## BARRS V. JACKSON.

HARRIET MARTINDALE SMITH died intestate and In a suit instiunmarried on the 19th April, 1839.

Upon her decease, application for letters of administration of her personal estate was made to the Prerogative an intestate, Court of the Archbishop of Canterbury by Sarah Harriot, letters of admithe wife of John Barrs, and by Richard Jackson; the for- nistration is not mer claiming as the niece and only next of kin, and the dence upon the latter as the second cousin and only next of kin of the the intestate's intestate. Richard Jackson also entered a caveat against the grant of letters of administration to Mrs. Barrs.

The cause came on for hearing in the Prerogative Court in July, 1840, when a decree was made to the effect that the Judge having read the evidence, and heard advocates and proctors (Wills and Pitcher) thereon on both sides at petition of Wills, by his final interlocutory decree, having the force and effect of a definite sentence in writing, pronounced, that, as far as it appeared from the evidence in this cause, Harriet Martindale Smith, the deceased in this cause, died a spinster without a parent, brother or sister, uncle or aunt, nephew or niece, or cousin german,

tuted in this Court for the

June 10th. July 2nd.

distribution of the assets of the grant of conclusive eviquestion who is sole next of kin.

10h. 582

BARRS 5.

JACKSON.

and intestate, leaving Richard Jackson, Wills's party, her lawful second cousin and next of kin; and that Pitcher had failed in proof that Sarah Harriet Barrs (wife of John Thomas Barrs), his (Pitcher's) party, was the lawful niece and next of kin of the said deceased: and decreed letters of administration of all and singular the goods, chattels, and credits of the said deceased to be committed and granted under the usual security to the said Richard Jackson, the lawful second cousin and next of kin of the said deceased; but, at petition of Pitcher, directed the said administration not to pass the seal for fifteen days from the date of the decree.

In January, 1841, the present bill was filed by Barrs and his wife against Jackson, stating that Harriet Martindale Smith died intestate, possessed of considerable personal estate, and in particular of a sum of £3800, New South Sea Annuities; setting forth the relationship of the plaintiff, Mrs. Barrs, to the intestate, (which she claimed as being the only surviving child of Robert James Smith, the elder brother of the intestate by the half blood); stating the grant of letters of administration to the defendant, and praying the usual accounts and administration of the personal effects of the intestate; that a competent part of the residue might be settled upon the plaintiffs and their issue; that the surplus might be paid to the plaintiff Mrs. Barrs; and that the defendant might be restrained from selling out or transferring, and the South Sea Company from permitting the sale or transfer of the stock.

The defendant, by his answer, relied on the proceedings in the Ecclesiastical Court, and suggested that Robert James Smith was illegitimate.

Circumstances tending to shew the relationship of Mrs. Barrs to the intestate, and that such relationship was acknowledged by the intestate, were put in issue by the pleadings; and evidence was very fully entered into in those particulars on the part of the plaintiffs.

Mr. Simpkinson and Mr. Heathfield, for the plaintiffs.

BARKS

July 2nd.

Mr. Purvis and Mr. Hubback, for the defendants.

The following authorities were cited: Bouchier v. Taylor(a), Thomas v. Ketteriche (b), West v. Willby (c), Long v. Wakeling (d), Blackham's case (e), Phill. Ev. vol. 2, ch. 1, sec. 4; Hargr. Law Tr. 473.

THE VICE-CHANCELLOR.—This is a suit for an account and payment to the plaintiffs of the residue of the personal estate of Harriet Martindale Smith, who died unmarried and intestate. The defendant is her administrator, and says he was her cousin and sole next of kin at her death. plaintiffs, contending that the female plaintiff was the intestate's niece and sole next of kin at her death, sue in right of the female plaintiff in that alleged character. And, substantially, the only question of fact in the cause is, whether Robert James Smith, the father of the female plaintiff, was legitimate. He appears to have been, both by the intestate and her father, recognised and considered as the son, whether legitimate or illegitimate, of the intestate's father, and there seems little or no ground for doubt, that, if Robert James Smith was legitimate, Mrs. Barrs, who is admitted by the defendant to be the lawful child of Robert James Smith, was the sole next of kin of the intestate at her death.

I have already stated my opinion, that, subject to the question of the conclusiveness against the plaintiffs' alleged title of certain proceedings in the Ecclesiastical Court, to which I am about to advert, (and upon which question alone my judgment was reserved), the evidence in the

<sup>(</sup>a) 4 Bro. P. C. 708, Toml. ed. (d) 1 Beav. 400.

<sup>(</sup>b) 1 Vez. sen. 333.

<sup>(</sup>e) 1 Salk. 290.

<sup>(</sup>c) 3 Phill. 374.

BARRS D. JACKSON.

present suit is such as to render an inquiry proper as to the disputed fact of the relationship of Mrs. Barrs; and that, supposing the Court not at once to dismiss the bill, an issue ought, according to the desire, in that event, of the defendant, to be directed for the purpose of trying it; the present state of the evidence leaving the matter in a condition of considerable obscurity and doubt, as it appears to me.

The proceedings in the Ecclesiastical Court, to which I have referred, took place upon the occasion of a contest for the grant of administration, which was claimed on one hand by the defendant as sole next of kin, on the other hand by the plaintiff, Mrs. Barrs, as sole next of kin, the alleged title of each being inconsistent with the alleged title of the other. Upon these conflicting claims, the parties respectively entered into evidence in the Ecclesiastical Court, and upon that evidence the Ecclesiastical Court decided the contest by granting the administration to the present defendant, on the ground that the plaintiffs had failed in proving Robert James Smith to have been the lawful brother of the intestate. It has now been contended before me, that such the adjudication of the Ecclesiastical Court in the regular exercise of its proper functions, founded, as the adjudication was, upon the question of pedigree, which is the question of fact raised in this Court, is conclusive upon that question of fact, so as to render any investigation of its truth here superfluous and improper, and being so, makes it the duty of this Court at once to dismiss the bill, whatever may be its own view of the truth, and that without any regard to new or additional evidence: it being admitted that the plaintiffs have more evidence here, in support of the alleged legitimacy of Robert James Smith, than was before the Spiritual Court. This is the point that I have had to consider, and am now to decide.

With the rule of the civil law rightly understood, which, in the language of Ulpian says, "Res judicata pro veritate

accipitur," the law of England generally agrees. The sound reason of the rule can scarcely be better expressed than it is by Paulus, in the Digest, thus: "Singulis controversiis singulas actiones, unamque judicati finem sufficere, probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem: maximè si diversa pronunciarentur" (a).

BARRS V. JACKSOW.

Other passages, in the same division of the Digest, are to this effect:—thus Ulpian says, "Et generaliter (ut Julianus definit) exceptio rei judicatæ obstat, quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii" (b).

Paulus says, "Cum quæritur, hæe exceptio noceat necne? inspiciendum est an idem corpus sit (c). \* \* \* Et an eadem causa petendi, et eadem conditio personarum: quæ nisi omnia concurrunt, alia res est" (d). And again, 'Si quis interdicto egerit de possessione, posteà in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actione proprietas vertitur" (e).

And Neratius, "Cum de hoc, an eadem res est, quæritur, hæc spectanda sunt: personæ; id ipsum de quo agitur; causa proxima actionis: nec jam interest, qua ratione quis eam causam actionis competere sibi existimasset: perinde ac si quis, posted quam contra eum judicatum esset, nova instrumenta causæ suæ repperisset" (f).

Voet, in his commentary on this title, says, "Non aliter tamen huic exceptioni locus est, quam si lis terminata denuò moveatur inter easdem personas, de eddem re, et ex eddem petendi causá; sic ut, uno ex his tribus deficiente, cesset. Eadem res intelligitur quotiens apud judicem posteriorem id quaritur quod apud priorem quasitum est. \* \* \* Eadem petendi causa est etiam, licet non eddem agatur actione, sed alio judicii genere eadem quastio ventiletur; cum

<sup>(</sup>a) Dig. lib. 44, tit. 2, sect. 6.

<sup>(</sup>d) Sect. 14.

<sup>(</sup>b) Sect. 7.

<sup>(</sup>e) Ibid.

<sup>(</sup>c) Sect. 12.

<sup>(</sup>f) Sect. 27.

BARES 0. JACKSON. eandem causam non tam actio faciat, quam potius origo petitionis. Qua ratione, cum propter rei emptæ vitium tale, propter quod eam emptor empturus non fuisset, et redhibitoria et quanti minoris actio competere possit, sic ut actio quanti minoris etiam redhibitionem tunc contineat, Juliano placuit, eum qui alterutra earum egerit, si altera posteà agat, rei judicatæ exceptione submovendum esse."

Vinnius, in a note to the 18th Title of the 4th book of the Institutes, upon the words "per exceptionem rei judicate," says, "Que ita agenti obstat, si eadem questio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa, petendi eadem conditio personarum;" and other commentators express themselves to a similar effect (a).

It may be doubted, I think, reasonably, whether, having regard to the different objects and purposes of the -two suits, if the present point were to be tried by the language of the Digest, or of the principal commentators upon it (including Voet), the illegitimacy of Robert James Smith could be held res judicata, so as to expose the demand in the present suit to that exception. The law of England must however govern in this case, and the authority of the House of Lords in Bouchier v. Taylor (b) has been represented as being in unison with the opinions of two no less distinguished Judges than Lord Mansfield there, and Lord Hardwicke in the earlier case of Thomas v. Ketteriche (c), favourable to the defendant's contention; of which another very learned and eminent lawyer, Mr. Hargrave, certainly took that view in the argument for the Duchess of Kingston's case, published in his collection of Law Tracts, where his opinion upon the present point was against the side on which he was counsel. In a prior argument however of his, that for the appellants in Bouchier

<sup>(</sup>a) And see Quint. Inst. Orat. lib. 5, c. 2. (b) 4 Bro. P. C. 708, Toml. ed. (c) 1 Vez. sen. 333.

v. Taylor, the interests of his clients were to sustain the exceptio rei judicatæ; and, perhaps, it may be thought that the side which he had to support, and did with signal ability and strenuousness support in that case so shortly before the other, may have influenced in some degree his judgment. His views of the conclusiveness of the sentence of the Ecclesisstical Court in the Kingston case were not, I apprehend, adopted by the House of Lords, and were certainly at variance with the unanimous opinion of the consulted Judges on that occasion. Of Thomas v. Ketteriche (the case before Lord Hardwicke) it may be observed that no fact was there in dispute. The question was one merely of law, of civil law, which the Ecclesiastical Court had decided: nor to the decree pronounced by Lord Hardwicke was it essential to hold the sentence of the Ecclesiastical Court conclusive or binding; for his Lordship's opinion upon the point of law agreed with that of the Ecclesiastical Court. He says,—"The suit might have been in the Ecclesiastical Court for a distribution as well as here: and that Court could not have contradicted the sentence by which administration was granted. Then I am equally bound thereby; being bound to determine by the same rules, like the case of legacy; for the rule of law, by which the decision is to be made, cannot be changed by choosing the Court in which to sue. But to enter into the merits, if it was open to me to determine contrary, according to the rules by which this computation is to be made, the plaintiff is not nearer: but in equal degree (a)."

In Bouchier v. Taylor several grounds of appeal were stated and insisted upon, as appears by the appellant's and respondent's printed cases, which Mr. Swanston was so good as to produce from his collection; and it was contended that, whether the decision of the Ecclesiastical Court was conclusive or not conclusive, the appeal was well

BARRS O. JACKSON. BARRS V. JACKSON. founded. It was said, that, independently of that question, the bill ought to have been dismissed upon the special circumstances. From the account given by Mr. Hargrave, who says that the decree was reversed on both grounds, without opposition by the Lord Chancellor, or any other lord, and that Lord Mansfield was the only speaker on the subject, it is to be gathered that Lord Mansfield thought. not only that the sentence of the Ecclesiastical Court as to the administration, was conclusive as to the distribution, but that, if the law were otherwise, the appeal ought equally to succeed. I suppose that the order or judgment of the House does not state the ground or reason of the reversal, and that the record and documents of that case are consistent with the possibility that the House collectively may not have judicially proceeded upon each branch or every part of the reasons assigned by Lord Mansfield for differing from the conclusions of the Master of the Rolls and the Lord Chancellor in the Court below. In that case Dr. Bouchier was sued in the original bill, not by the personal representative of Alice Merchant, but by persons claiming beneficially under the trusts of her will. intestate had died in March, 1748. The proceedings in the Ecclesiastical Court having been in pendency for several years, were determined in January, 1754, after the examination of a great number of witnesses. The original bill in this Court was not filed until October. 1758. The plea was heard in April, 1759, and the bill fully answered in the same year. The answers were replied to in 1760. A bill of revivor and supplement, filed in October, 1765, was answered in 1766; and not until the 11th of March, 1774, thirty-one years after the intestate's decease, when all the witnesses who had been examined for Dr. Bouchier in the Ecclesiastical Court were also dead. (he adduced no parol evidence in this Court on the question of pedigree), was the cause first brought on to be heard. Dr. Bouchier's relationship, it should be recollected, was clear and undisputed; but there was a strong body of testimony against that alleged by Alice Merchant. BARRS 9. JACKSON.

Under such circumstances as these, if, putting the argument of conclusiveness out of the question, the House of Lords, in possession of that evidence for and against Alice Merchant's pedigree upon which the Spiritual Court had decided against her claim of kindred, considered the decision well founded, and not finding that evidence materially added to or varied, thought itself warranted in disbelieving the pedigree, or, upon the other grounds, in dismissing the bill, it is difficult to consider such a conclusion unreasonable.

If I might, without presumption or impropriety, express an opinion, I should, judging from the printed appeal papers, say, that, assuming the sentence there not to have been conclusive, the decision of the House of Lords was, upon the whole case, a correct and right decision.

It must be borne in mind also that both Thomas v. Ketteriche and Bouchier v. Taylor were previous to the case of the Duchess of Kingston (a). The Lord Chief Justice De Grey and the other consulted Judges were in that case, as is universally known, of opinion that a sentence (meaning a sentence fairly and properly obtained) in the Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy. The ability and learning of the argument delivered by the Lord Chief Justice of the Common Pleas on that occasion are acknowledged by every one.

Lord Camden, Lord Mansfield, and Lord Chancellor Bathurst, each of whom pronounced a vote of guilty on that trial, must have agreed with the Judges in their answers to one or both of the questions thus answered for

BARRS

JACKSON.

them by Sir W. De Grey; and I am not aware of any reason for believing, that either of those noble and learned lords dissented from the Judges as to either question. The Lord Chief Justice said-" From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter, directly in question in another Court: secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction. They do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion, except where, in the case of marriage, an issue is joined upon the record in certain real writs upon the legality of a marriage, or its immediate consequence, 'general bastardy;' or in like manner, in some other particular instances lying in the peculiar knowledge

of their courts, as profession, deprivation, and some others. But even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue, triable by a jury, is found upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth."

BARES 9. JACKSON.

His Honor, after reading some further passages in the same judgment, proceeded as follows: ]-In Outram v. Morewood (a), we find Lord Ellenborough laying it down, that a judgment is final only for its own proper purpose and object, and no further. In Blackham's case (b), Lord Holt long before had said, speaking of the Ecclesiastical Courts-"A matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary. But that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case: because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been not married."

If the law as derived from these and other authentic sources, is, as I apprehend it to be, that generally the judgment, neither of a concurrent nor of an exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and ob-

<sup>(</sup>a) 3 East, 346; see p. 357.

<sup>(</sup>b) 1 Salk. 291.

BARRS

JACKSON,

ject; it may be thought difficult to say why the sentence in the present case ought, upon the present question, to be deemed conclusive. The object of that proceeding, and of the sentence, was not distribution, but merely the appointment of an administrator, whose duty, when appointed, it would be to distribute the estate according to law. Nor was it of necessity that the next, or any of the next, of kin, should be appointed to that office. There are cases, indeed, in which the sole next of kin of an intestate, though adult, present, under no disability, and of unimpeached conduct, is excluded, notwithstanding the positive provisions of the legislature in that respect: Young v. Pierce (a); Bridges v. The Duke of Newcastle (b); Thomas v. Butler (c); Fielder v. Hanger (d). It is plainly not of the essence of such a sentence that the preferred person should be the next of kin to the intestate. It happened here that such in truth and expressly was the particular ground of what the Ecclesiastical Court did. But suppose the case of the Ecclesiastical Court excluding the next of kin from the administration, on the ground of some alleged fact disqualifying him, in the judgment of that jurisdiction, notwithstanding admitted proximity of blood; is the truth of that alleged fact for ever incontrovertibly established against him? Put the case of administration granted to a man as a creditor of an intestate, and the administration subsequently revoked after a contest, and new letters of administration granted to his opponent on the ground that there was no debt (if there may be such a course consistently with the rules and practice of that jurisdiction); is it to be said that the former is barred of his demand, and precluded from proving afterwards if he can, and recovering or receiving, his debt? Suppose a dispute for admi-

<sup>(</sup>a) 1 Freem. 496.

<sup>(</sup>c) 1 Vent. 217; App. to Hagg. vol. 2.

<sup>(</sup>b) 3 Phill, 381, cited.

<sup>(</sup>d) 3 Hagg. 769.

nistration with the will annexed, between the sole residuary legatee and another, decided in favour of the latter, on the ground of the former having released or assigned, or being an alien-enemy, or an infant; is he precluded from shewing in a court of equity that there was no release or no assignment, or proving there his English birth or true age? Again—can it be said that a decision in lunacy upon a question of the committeeship of the real estate between A. and B., each claiming adversely to the other to be the lunatic's heir-apparent, though turning upon that point, concludes the fact of heirship between the contending parties after the ancestor's death? Or, suppose the case of a creditor's bill in equity by a simple contract creditor defeated on the ground of a general release, and admit the decree of dismissal to be final in this Court as to the debt demanded; would it be conclusive in another suit by the same plaintiff as a specialty creditor, so as to preclude him from denying the execution of the release, or shewing it void for fraud, or as founded on an illegal consideration? Lord Ellenborough certainly, and the Court of King's Bench in Outram v. Morewood, decided most accurately with reference to the pleadings in that action at common law, that an allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in Outram v. Morewood raised, as to the same property and for the same purpose, the same issue as was raised and tried in the action the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English courts of common law and those of other courts of But it is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment

BARRS S. JACKSON. BARRS S. JACKSON.

of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty. questions, which are governed by principles in some respects peculiar. On the whole, I am not at present prepared to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of Robert James Smith, and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy rem judicatam between the parties on a question of distribution.

But again—there seems to me much analogy for the present purpose between a sentence against the party libelled in a cause of jactitation, and the sentence in question here. As the former does not conclude the question of marriage, but decides merely that the party has, up to that time, failed in proving it, leaving him at liberty to prove it in any other proceeding, so in the present case, the Spiritual Court has done no more, I apprehend, than declare to the same effect with regard to the alleged kindred. I am aware that matrimonial causes may be said to have some peculiar privileges. Oughton thus expresses himself:—" Sententia lata in causa matrimoniali contra matrimonium numquam transit in rem judicatam et habet multa privilegia. Et

quoties Ecclesia decipitur pronunciando sententiam contra matrimonium ex novis probationibus (etiam aliquando ex eisdem) potest revocari prior sententia. Et ratio est ad evitandum peccatum &c." Without insisting, however, too much on the application of that reason to the case of an administrator, whose duty it is to obey, as all acts of Parliament, so especially the statutes of distribution, and who is sworn " Quod fideliter administrabit omnia et singula bona et quod reddet verum computum," it may be as well to compare the language of the two sentences. The sentence in The Duchess of Kingston's case was thus: - We, &c., have thought fit and do thus think fit to proceed to the giving and promulging our definitive sentence or final decree in the same cause (i. e. Chudleigh v. Hervey) in manner and form following (to wit): Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered that the proctor of the said honourable Elizabeth Chudleigh hath fully and sufficiently founded and proved his intention, deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in the same cause, and now remaining in the registry of this Court (which libel and allegation and other pleadings and exhibits, we take and will have taken, as if herein repeated and inserted, for us to pronounce as hereinafter we shall pronounce); and that nothing, at least effectual in law, hath on the part of the right honourable Augustus John Hervey been excepted, deduced, exhibited, propounded, proved, or confessed in the same cause, which may or ought in anywise to defeat, prejudice, or weaken the intention of the said honourable Elizabeth Chudleigh deduced as aforesaid; and particularly that the said right honourable Augustus John Hervey hath totally failed in the proof of his allegation given in and admitted in this cause, whereby he pleaded and propounded a pretended

BARRE 9.

BARRS 9.

JACKSON.

marriage to have been solemnized between him and the said honourable Elizabeth Chudleigh, spinster: therefore we, &c., do pronounce, decree, and declare that the said honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel given in and admitted in this cause, and now remaining in the registry of this Court. was and now is a spinster, and free from all matrimonial contracts or espousals (as far as to us as yet appears), more especially with the said right honourable Augustus John Hervey; and that the said right honourable Augustus John Hervey, notwithstanding the premises, did, in the years and months libellate, wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in marriage to the said honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony: wherefore we do pronounce, decree, and declare, that perpetual silence must and ought to be imposed and enjoined the said right honourable Augustus John Hervey as to the premises libellate, which we do impose and enjoin him by these presents, &c."

The sentence here was in these words:—[His Honor here read the sentence as before stated (a).]

I see no substantial difference, as I have said, for the present purpose; nor does it seem unreasonable that a party, where the only contest is for administration, should be allowed not to put forward the whole strength of his case, but should, especially if he believe his opponent honest or solvent, be able to retire early with a half-proved case from such a preliminary dispute for an office, without forfeiting his right of distribution. The defendant's counsel have in effect admitted, that it is competent to any person, who did not engage in that proceeding, to shew that he is, if in truth he is, the intestate's husband, or sole

next of kin, to the absolute exclusion of both the present parties from distribution; and have almost, if not quite, conceded that, without appealing or questioning the soundness of what the Ecclesiastical Court did when the case was before it, the present plaintiffs may adopt a proceeding in that jurisdiction, under which they may be let in to shew. for the effectual purpose of distribution, the relationship which they allege, if they truly allege it. But the defendant contends, that it is an essential preliminary, in each case, to obtain a revocation or repeal of the existing grant of administration, and that though such a revocation or repeal might give the plaintiffs a title to sue in this Court. they have none previously. To this position I cannot Without giving any opinion, indeed without agree. knowing, what would be the particular course or formalities requisite in the Ecclesiastical Court were the plaintiffs again to resort to that jurisdiction, it is sufficient for me to be satisfied, that the concurrent jurisdiction which I am now administering is not, in matters of form and procedure, bound by the regulations of other tribunals. and that to compel an administrator to perform an obligation and trust which the legislature has strictly commanded him to perform, is not less the duty of this Court, because the allegations by means of which he obtained that office were, if they were, false.

BARRS v. JACKSON.

In Blackham's case, no such difficulty seems to have occurred to the mind of Lord Holt; and I am mistaken, if instances cannot be found in the Court of Chancery, where, without any repeal or revocation of the letters of administration, an administrator has been compelled to account and distribute in a manner at variance with the alleged title under which he obtained that character. I may, before concluding, perhaps not improperly refer to the cases of Bissell v. Axtell (a), Cross v. Salter (b), Hillyard

<sup>(</sup>a) 2 Vern. 47.

<sup>(</sup>b) 3 T. R. 639.

BARRS v. JACKSON.

v. Grantham (a), Doe v. Seaton (b), Shearm v. Burnard (c), in addition to those which I have already mentioned. Upon the several considerations to which I have alluded, being of opinion, that it is not necessarily, and ought not without necessity, to be inferred from the judgment of the House of Lords in Bouchier v. Taylor, that the House judicially held the sentence then in question conclusive: being also of opinion, that the decree in Thomas v. Ketteriche and my present decision may well stand together.-I feel it my duty rather to incur the charge of differing, if I am differing, from the high and venerable authority of Lord Hardwicke and Lord Mansfield, than, in contradiction to my fixed belief of what the law of this country is, to say that the sentence of the Ecclesiastical Court, though unrevoked, is in the present suit conclusive on the question of distribution. I have considered and disposed of this case, as if the argument upon the point of the alleged conclusiveness of the sentence were clearly open to the defendant: but I wish to be understood, as not deciding whether, as the pleadings are framed, the point is or is not open to him.

Issue,—whether at the time of the death of the testatrix, the plaintiff Mrs. Barrs, was her sole next of kin.

(a) Rep. temp. Hardw. 312, the cases there cited. cited; 2 Vez. sen. 245, cited; see (b) 2 Cr. M. & R. 728. Woddes. Lect. vol. 3, p. 318, and (c) 10 Ad. & Ell. 593.

#### STORY V. FRY.

IN 1829. Joseph M. Bramley, being indebted to the A person in saplaintiff and his then co-partner, James, to the amount of 711. 10s. 6d. for wearing apparel, and being about to sail for India, was applied to by the plaintiff for payment of the debt. Bramley being unable, at that time, to comply with fore the bill arthe request, with the consent of the plaintiff and his copartner, drew a bill of exchange upon his father for the amount, which his father accepted. The bill bore date the 1st September, 1829, and was payable at 18 months to the stances would order of the plaintiff.

On the 3rd September, 1829, Bramley, the son, went to India, whence he never returned.

The bill was from time to time renewed, by means of within six bills accepted by Bramley, the father, for the original amount, and also for a small amount of goods subsequently supplied to the son. The last of these bills became due on the 4th of February, 1832, and was dishonoured.

In February, 1836, Joseph M. Bramley died in India, having by his will, dated the 28th August, 1829, devised and bequeathed all his real and personal estate to John Fry ther when a and C. J. Showbridge, their heirs, executors, administrators, and assigns, upon trust to sell such part as was capable of conversion, and to stand possessed of the proceeds for the benefit of his widow and child; and he appointed John may not be in-Fry and C. J. Showbridge his executors.

The testator's widow and his only child, an infant, a son, survived him. The will was proved by the executors six years after on or about the 24th June, 1839.

The bill was filed in September, 1839, by the plaintiff, in India being on behalf of himself and all other the simple contract creditors of the testator, against the executors; and (by

1842.

May 31st, June 1st.

tisfaction of a previous debt due from him, gave his creditor a bill of exchange, and berived at maturity went to India, whence he never returned. As soon as circumpermit after his death in India, his will was proved by his executors in England; and years after his death a creditors' bill was filed against the executors:-Held, that the plaintiff was not barred by the Statute of Limitations.

Quære, whedebtor dies abroad and the cause of action or suit has not accrued in his lifetime, a suit stituted for the administration of his effects at any time within probate of his will?

made by statute personal assets for the payment of the debts of a deceased

debtor, it is unnecessary to make the debtor's heir-at-law a party to a suit instituted for the administration of the assets.

STORY
U.
FRY.

amendment in July, 1840) against the widow and son. After stating the foregoing facts, and alleging that the testator died seised of a certain freehold house in Calcutta, and possessed of divers houses in India, which were personal estate, and of other personal estate both there and in England, it prayed the usual relief in respect of the personalty, and that, if necessary, the real estate might be applied in aid of the personalty.

The defendant Showbridge, who was the acting executor, admitted assets in England to a very trifling amount only, but he stated that the personal assets in India were considerable, and that the freehold house at Calcutta was worth about £2500. He submitted to the Court, whether the freehold house was, or was not, assets for the payment of the testator's debts, and whether the Registrar of the Supreme Court at Bengal, who had been appointed administrator in India, with the will annexed, ought to have been a party to the suit. He averred, that when the several bills of exchange before mentioned had been dishonoured, no notice of the dishonour had been communicated to the testator, but that the renewals of the bills had been matter of private arrangement between the plaintiff and Bramley, the father. He claimed the benefit of the Statutes of Limitations, the 21 Jac. 1, c 16, and 9 Geo. 4, c. 14, as if he had pleaded the same.

The other defendants, by their answers, submitted, whether the house in Calcutta was, or was not, assets for the payment of the testator's debts, and relied, in like manner as the executor, on the Statutes of Limitations.

The plaintiff, in support of his case, examined his late co-partner, James, who had retired from the partnership in December, 1833, upon executing an assignment of all his interest therein to the plaintiff.

With a view to take the case out of the Statute of Limitations, in case the Court should hold that the statute was applicable in the testator's lifetime, the plaintiff gave in

evidence a letter of the testator, dated the 7th February, 1834, (which was set out in the bill), in which the testator, after acknowledging the receipt of two letters from the plaintiff's firm making a claim upon him for money, expressed doubts whether the money had not been paid by his father, and requested them to procure a note from his father on the subject, adding, however, "Should your claim be valid, the moment you satisfy me I am your debtor to the full, you may depend on my using my utmost endeavours to pay you; but I must still ask for time, for though you advert to my affluent circumstances, I have not got the command of sufficient means to pay so large a sum at sight."

The plaintiff also gave in evidence a note written to him by the father, dated the 4th August, 1834, (which, however, did not appear to have been communicated to the son), in which the father stated, that the plaintiff's demand remained as it formerly did.

No evidence was entered into on the part of the defendants.

It appeared that the freehold house in Calcutta was purchased after the date of the will.

Mr. Kenyon Parker, and Mr. Younge, for the plaintiff.—First, the testator having gone abroad before the right of action accrued, and never having returned to England, the Statute of Limitations did not begin to run till probate was taken out by the executors in England: Douglas v. Forrest (a). In Rhodes v. Smethurst (b), Alderson, B., says of Douglas v. Forrest—"The statute never had begun to run against the plaintiff, until probate was taken out to the testator." Williams v. Jones (c) shews that, where the debtor returns from India, the creditor

STORY

o.
FRY.

<sup>(</sup>a) 4 Bing. 686 1 M. & P. 663. (b) 4 Mee. & W. 65. (c) 13 East, 439.

STORY v. FRY.

has six years after his return within which to commence the action. We say, we never had an opportunity of doing this.

Secondly, if the statute began to run in the testator's lifetime, the letter of February, 1834, takes the case out of the statute: Bird v. Gammon (a).

Mr. Russell, and Mr. Cole, for the defendants the executors.—The plaintiff is expressly barred by the Statutes of Limitations, there being no saving clause in his favour in any of them. In the statute of James (b) there is a saving in respect of the creditor being beyond the seas; but, until the statute of Anne, there was no saving in respect of the debtor being beyond the seas. That statute, however, enacts (c), that in case of the absence of defendants beyond the seas, the actions enumerated in the statute of James may be brought within the times mentioned in that statute, after the return of the defendants from beyond seas. The case in East is expressly within the saving of the latter statute. The other authorities which have been cited seem inconsistent with the true construction of the statutes. The Vice-Chancellor referred to Piggott v. Rush (d), and Gage v. Bulkley (e). We submit that, in all cases in which the savings of the statutes do not expressly apply, the statutes are a complete bar. Otherwise, the enactment contained in the statute of Anne would have been unnecessary.

Then, if the plaintiff is otherwise barred by the statute, does the letter of 1884 keep the remedy alive? We submit that it is merely conditional, and does not amount to an acknowledgment of any debt: Whippy v. Hillary (f); Routledge v. Ramsay (g); Fearn v. Lewis (h).

- (a) 3 New Cases, 883, 5 Scott, 213.
  - (b) 21 Jac. 1, c. 16, s. 7.
  - (c) 4 & 5 Ann. c. 16, s. 19.
  - (d) 4 Ad. & Ell. 912.

- (e) Rep. temp. Hardw. 278.
- (f) 3 B. & Ad. 399.
- (g) 8 Ad. & Ell. 221.
- (h) 6 Bing. 349; 4 M. & P. 1.

In addition to these objections, the plaintiff has not proved notice of dishonour of the bills in the hands of the acceptor. As to that, the same proof is requisite here as at law.

STORY v. FRY.

Mr. Wigram, for the defendants, the widow and infant, said that, by the stat. 9 Geo. 4, c. 33, the house at Calcutta was made personal assets in the hands of the executor or administrator. He therefore submitted that the bill was improperly filed against his clients, and ought to be dismissed as against them with costs.

Mr. Kenyon Parker, in the course of his reply, observed, that whatever remained after sale of the house at Calcutta would belong to the heir-at-law by resulting trust. He referred to Thomson v. Grant (a), decided on the construction of the stat. 5 Geo. 2, c. 7.

THE VICE-CHANCELLOR.—It is admitted that the debt was incurred, that a bill of exchange was given in respect of it, that the testator left this country before the bill arrived at maturity, that he never returned, that he died in the East Indies within six years before the suit was instituted, and that the bill, subject to the objection as to the unfruitful renewals of it, has never been paid or satisfied. With these admitted facts before me, I think, upon the authorities, old and new, which have been referred to, that the Statute of Limitations does not apply. It is therefore unnecessary to give any opinion whether the letter of February, 1834, coupled or not coupled with that of August, 1834, takes the case out of the statute.

With respect to the widow and son, it appears to me that they are not necessary or proper parties to this bill. If, therefore, they insist upon it, the bill must as to them be dismissed.

STORY
".
FRY.

BILL dismissed as against the defendants, the widow and heir, with costs; without prejudice to any new bill being filed against them, and without prejudice to any question between the creditors and the executors, or between the executors and the administrator in India; and without prejudice to any question by whom or out of what fund the costs of the defendants, the widow and heir-at-law, are ultimately to be borne.

Usual decree in creditors' suit. Account of personal estate and of produce or proceeds of any real estate in India. Inquiry as to outstanding estate, including outstanding produce or proceeds of any real estate in India unsold, or any outstanding personal estate in India, and under what circumstances.

#### June 3rd.

# EYSTON v. SIMONDS.

A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it by reason of the alienage of a party through whom he The claimed. purchaser, by his own inquiries, ascertained the defect of title, but did not, till after some months of negotiation with the vendor, repudiate the contract. The vendor then filed his bill for specific performance, and pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown: -Held, that he was entitled to a decree.

IN 1785, Sir John Gallini, an alien, purchased the equity of redemption of an estate at Yattenden, in Berkshire. In May, 1789, at which time all his children were born, he obtained letters of denization. In October, 1799, he made his will. By indentures of lease and release of the 7th and 8th February, 1803, the legal fee in the premises was conveyed to him. On the 5th January, 1805, he died.

By the will of Sir John Gallini all his estates in Berkshire were devised to trustees upon trust, after the determination of certain life estates therein, for the children of the survivor of his sons and daughters, as tenants in common in tail. Francis Cecil Gallini, the survivor of the testator's sons, died in 1815, leaving several children, all of whom executed proper assurances for barring their estates tail; and under them or their heirs, the plaintiff and James Wheble, since deceased, claimed title as trustees for the sale of the property.

The property being put up to sale by auction, in lots, in February, 1839, the defendant was declared the purchaser of lot 7. He afterwards purchased by private contract lot 2. He paid deposits on both lots. An abstract of the vendor's title to the lots was delivered to him within the

time stipulated for by the contract, namely, before the 25th March. The purchase was to be completed on the 24th June, 1839.

EYSTON V. SIMONDS.

As no notice was taken in the abstract of the alienage of Sir John Gallini, the purchaser's solicitors wrote to the vendor's solicitors to inquire into that circumstance. In answer to these inquiries, statements were made by the vendors' solicitors, in which the before-mentioned facts as to Sir John Gallini's alienage and denization were admitted. The first communication on this subject, on the part of the vendors, was made on the 29th April, 1839; negotiations, however, were carried on between the parties from that time until the 14th October, 1840, when the purchaser refused to complete the contract.

On the 1st February, 1841, the plaintiff filed his bill for specific performance of the contract.

The defendant by his answer set up several objections to the title, of which those which related to Sir John Gallini's alienage, and which had already been the subject of discussion, were of this nature: first, that the legal fee in the premises having been conveyed by the heir of the mortgagee to Sir John Gallini in 1803, and his will having been dated previously to such conveyance, and not republished, the inheritance, which would have otherwise devolved to his heir, devolved to the lord of the fee for want of such heir; none of the children of the testator having been born after the date of the letters of denization, and the stat. 25 Geo. 2, c. 39, (amending the stat. 11 & 12 Will. 3, c. 6), having no application: secondly, that it was doubtful whether the letters of denization had a retrospective operation so as to enable Sir John Gallini to retain and enjoy the hereditaments which had been purchased by him in 1785. On these grounds the defendant insisted that it did not appear that Sir John Gallini ever had any legal or equitable interest in the premises.

The defendant having brought his action to recover the

Erston
9.
Simonds.

amount of his deposits, with interest, was restrained in that action by injunction; and by the order granting the injunction, dated the 18th February, 1841, it was referred to the Master to inquire and state whether a good title could be made to the premises, and if so, when it was first shewn that such good title could be made; the plaintiff undertaking to abide by such order as to the demand in the action and the costs at law as the Court might direct.

The Master reported that a good title could be made to the premises: that, at the date of the contract, the premises and the whole estate and interest therein, both legal and equitable, had escheated to and were vested in the Crown; that since the date of the order of reference, viz., on or about the 22nd July, 1841, the plaintiff had obtained from the Crown a grant of the premises to him, his heirs, and assigns; and that such grant was first produced and shewn to the defendant on the 27th November, 1841. The Master therefore found that a good title was first shewn on the last-mentioned day.

Mr. Wigram and Mr. Parry, for the plaintiff.

Mr. Cooper and Mr. Collins, for the defendant.—The plaintiff, at the time of the contract, had no title, either legal or equitable. The children of the testator were born before he obtained his letters of denization, and the letters had not a retrospective operation: Co. Litt. 2. b., 8. a., 129. a; Rex v. Holland(a); Fourdrin v. Goudey (b); Du Hourmelin v. Sheldon (c). [The Vice-Chancellor.—The Master has found that the whole legal and equitable title to this property was, at the time of the contract, in the Crown.]

Then the plaintiff having no title at the time of the contract, cannot, on the ground of having subsequently procured a title by means of the consent of the Crown, enforce the contract in this Court; for in such case there

<sup>(</sup>a) Alleyn, 14; 1 Roll. Abr.

<sup>(</sup>b) 3 M. & K. 402.

<sup>19</sup> b.

<sup>(</sup>c) 1 Beav. 79.

is no mutuality of remedy: Tendring v. London (a), Armiger v. Clark (b), Noel v. Hoy (c). Besides, there is ground for supposing that the plaintiff knew of the defect, and if so, he cannot, under any circumstances, be allowed to enforce the contract, even though he may have procured a title before the report: Sug. V. & P. vol. 1, p. 346, Bryan v. Lewis (d), Lechmere v. Brasier (e), Dalby v. Pullen (f). The dicta of Lord Eldon, in Mortlock v. Buller (g), and Boehm v. Wood (h), apply only to the case of a party selling what he believes to be his own. If the plaintiff should succeed, the effect will be, not to give the purchaser the original title cured of its defects, but to force upon him a new title: Magennis v. Fallon (i).—The following cases were also referred to, as shewing the extreme limits to which the Court had gone in favour of the vendor: Lord Stourton v. Meers (k), Hoggart v. Scott (l), Wynn v. Morgan (m), Chamberlain v. Lee (n). The case of Cumming v. Forrester (o) was also mentioned.

1842, Eyston o. Simonds.

THE VICE-CHANCELLOR.—The estate in question appears to have been purchased by Sir John Gallini, previously to the year 1786. It appears that he continued in the enjoyment of it from that time till his death, which took place in or about the year 1805: and from that time to the present, the estate has been enjoyed by his family, or those claiming under them, all of whom derive their title under his will. Therefore there has been an enjoyment for more than half a century under that title.

The trustees of the family, being in possession of the estate under this title, and being desirous to sell it, put

- (a) 2 Eq. Ca. Abr. 680.
- (b) Bunb. 111.
- (c) Sug. V. & P. Vol. 1, p. 346.
- (d) Ry. & Moo. 386.
- (e) 2 J. & W. 287.
- (f) 3 Sim. 29; 1 Ry. & M. 296.
- (g) 10 Ves. 315.

- (h) 1 J. & W. 421.
- (i) 2 Molloy, 566.
- (k) 2 P. W. 630, cited.
- (l) 1 Russ. & M. 293.
- (m) 7 Ves. 202.
- (n) 10 Sim. 444.
- (o) 2 J. & W. 334.

EYSTON v.
SIMONDS.

it up to sale by auction. No blame can attach to them for selling that which they believed to be their own property. It now appears that Sir John Gallini was an alien, and that when he acquired the equitable title to the estate in the first instance he had not obtained letters of denization. He afterwards obtained letters of denization, and also the legal fee, which legal fee subsequently came to the Crown.

This objection to the title, (and it was a valid objection) was the subject of considerable negotiation between the vendor and the purchaser, and was not removed till after some investigation of the title in the Master's office. It is now alleged, on behalf of the purchaser, that this is not one of the cases, in which the rule, allowing a vendor to make good his title after the stipulated time, can apply; as it is the case of a party selling an estate to which he had not any title at the time of the sale, and afterwards acquiring a title. That is not my view. True it is, that the title was subject to the chance, that by a certain course of procedure the Crown might defeat it; but, subject to such defeasibility, the title was good. What has been done, has not been substantially to acquire a new title, though in form the title is new, but to relieve it from the defeasibility to which it was before subject. The most, or the only, effectual mode of doing this, was, that the Crown should seize the estate, that an inquisition should be taken, and that, on the return of that inquisition, there should be a grant from the Crown. All this has been done at the expense of the vendor for the purpose of curing the defect. I apprehend, therefore, that this case is within the established doctrine of the Court, which allows the vendor, within certain limitations, to make good the title when the matter is before the Master, and, in some cases, even after it has left the Master's office.

A point which struck me in the course of the argument was this: it appears that when the abstract was delivered,

neither the letters of denization nor the fact of the alienage were noticed in it, and, therefore, but for the notice taken of that fact by the purchaser, he might have taken the estate with this infirmity of title—an infirmity of a grave nature as far as relates to the title merely, though not perhaps of great consequence, considering the practice of the Crown in such cases. It did, however, occur to the purchaser, that Sir John Gallini was or might be an alien, and it appears that, in the year 1839, questions were put by him to the vendors, and answers were returned, by which the state of the title in that respect was disclosed. Now it appears to me to be very possible, though it is not necessary to decide, that if, at that moment, the purchaser had held his hand, and had said, A material fact has been concealed and withheld from me, and, therefore, I refuse to complete the purchase -it is possible, under such circumstances, that he could not have been compelled to complete it. I, however, do not decide that point. Instead of so acting, the parties continue in negotiation, in the course of which a further opinion is taken on the title; and it is not till the end of the year 1840, this having occurred in 1839, that the matter is broken off. Having regard to what took place in the interval between April, 1839, and October, 1840. having regard to the frame of the answer, to say nothing as to the order which has been obtained, I am of opinion that the point is not now effectually open to the purchaser. but that the decree must be made in favour of the vendor, subject to the payment to the purchaser of all costs up to the report and the confirmation of it, inclusive, and that subsequently to the confirmation no costs should be given on either side.

1842.

Eyston v. Simonds.

June 25th.

A person with notice that the small tithes of a certain parish are payable to the vicar, obtains an assignment of a lease of the great and smail tithes. the grantors of such lease being the trustees of a charity, who are entitled to the great tithes only, but who have always in form granted leases of both kinds of tithe. The assignee being unable to recover the small tithes at law, procures, at law, an apportionment of the rent. This Court, under such circumstances, will relieve against

the apportionment.

## ATTORNEY-GENERAL v. DIXON.

IN 1830, the Governors of Sir John Hawkins's Hospital at Chatham, in consideration of an annual rent of £160, granted to one Smith a lease of all the tithes of corn, grain, fodder, hay, hemp, lambs, wool, pigs, and all manner of other tithes whatsoever, with the appurtenances, belonging to the said governors, in right of the said hospital, growing and arising in the parishes of Welling and Wickham, alias East Wickham, in the county of Kent.

Although this had been the usual form of the leases granted by the governors of the hospital for many years, it appeared that they had never, in fact, enjoyed the small tithes of Welling and Wickham, but that such tithes had always been paid to the vicar of Plumstead, of which parish Welling and Wickham were townships.

In August, 1832, the defendant Dixon, who for a year previously had paid to the vicar a composition for the small tithes of a farm which he held in Wickham, obtained from Smith an assignment of his lease. At the time of the assignment he was distinctly told that the tithe of hay was payable to the vicar, and he took a minute of that fact.

After the assignment Dixon refused to pay small tithes to the vicar; whereupon the latter brought his action and obtained a verdict. Dixon then refused to pay the rent to the hospital, and, to an action brought by the trustees, pleaded that he had been evicted of the small tithes demised to him by the lease. The action was tried, and the value of the small tithes having been proved to be £80 a year, the jury apportioned the rent accordingly, and found that the annual rent due in respect of the lease was £80 only.

The present information was filed against Dixon, and

also (as parties colluding) against the governors of the hospital; and it prayed that the lease might be delivered up to be cancelled, or that Dixon might be decreed to hold the lease at the rent of £160, taking only great tithes.

ATT.-GEN.

O.

DIXON.

The defendant Dixon, by his answer, expressly averred, that having obtained the lease and seen in what manner the tithes were described, he determined to take advantage of such description.

Mr. Boteler and Mr. Sandys, for the relators, observed, that supposing that at law the rent due under the lease was £80 only, yet in equity a lease so improvidently granted by trustees of a charity would be relieved against. And here the defendant Dixon had full notice of the terms upon which he was to take the lease.

Mr. Simpkinson, for the defendant Dixon, contended that the relators had not shewn that the small tithes had invariably been enjoyed by the vicar.

Mr. Wray, for the governors of the hospital.

In the course of the argument the Vice-Chancellor referred to Ogilvie v. Foljambe (a).

The Vice-Chancellor (b).—It being admitted that £80 would be much too low a rent for the great tithes, it is impossible that the lease, being of charity property, can stand at that rent. The defendant Dixon may have his choice, either to give up the lease or to keep it at the rent of £160 per annum, as from the time of filing the information. This disposes of one part of the case. The only point left is as to the rent to be paid from 1884 to the date of the information.

<sup>(</sup>a) 3 Mer. 53. (b) Ex relatione Mr. Benedict Chapman.

ATT.-GEN.

b.
Dixon.

[Mr. Simpkinson having elected to keep the lease on the terms stated by the Court, the Vice-Chancellor offered him an inquiry as to the circumstances under which Smith and Dixon respectively acquired the lease, and whether it was substantially their intention to give the rent of £160 for the great tithes alone. Mr. Simpkinson declining the inquiry, the Vice-Chancellor proceeded as follows:]—Mr. Simpkinson having declined the inquiry, I must take it that Smith took his lease with notice of the claim of the vicar to the small tithes, and that Dixon had, when he took the assignment, notice also of the claim, and that it was substantially the intention of Smith and Dixon at the commencement, to receive no more than the great tithes.

The case stands thus:—A lease is granted by the corporation, in which some subjects are included to which the corporation had no claim. The lessee after eviction, or after circumstances tantamount to eviction, has been held legally entitled to an apportionment of rent in respect of these subjects. But if, in fact, the lessee knew that the lessors had not such rights, and that they never asserted practically a title to more than the great tithes; if this all the time was well understood by all parties; if the party contracting for the lease contracted for no more than the great tithes; if the person who adopted the contract had no more in his view;—a Court of Equity cannot permit the apportionment to take place to the prejudice of the charity. The lessee had, and the assignee has, what each in truth meant to contract for. The full rent must be paid from the year 1834.

As to costs, I think the hospital ought not to have inserted these small tithes in their lease. It may have been done by way of continual claim—of keeping alive a supposed right against the vicar. This is not an accurate or proper way of transacting business. I shall not fix the defendant Dixon with costs: I wish it to be

understood, however, that it is not approbation of his conduct, but want of approbation of the conduct of the lessors. that induces me to take this course.

1842. ATT .- GEN. v. DIXON.

DEFENDANT Dixon to pay full rent from 1834 to the time of the information; and the defendant, consenting to take the lease, to pay full rent from the time of the information. No order as to costs as far as relates to the defendant Dixon. The costs of the Attorney-General to be paid by the hospital. No order as to the costs of the hospital.

## Boss v. Godsall.

BY the marriage settlement of Mr. and Mrs. Boss, certain By a clause in funds, the property of Mrs. Boss, were assigned to the defendant Godsall and another trustee, upon trust for the separate use of Mrs. Boss for life, without power of anticipation, and after her decease upon trust for Boss for life, ing, of the wife, and upon other trusts therein mentioned. The settlement contained a proviso that it should and might be lawful for the trustees or trustee for the time being, and they or he curity of his were thereby required at any time or times, and from time to time after the solemnization of the said intended marriage, during the life of the intended wife, at her request, to be certified by writing under her hand, to advance of the Insolvent or lend to the said intended husband at interest, on the security of his bond, out of the trust-monies thereby settled as aforesaid, any sum not exceeding £200. provided, that the trustees should not be obliged to call in to the terms of the money which should be so lent, unless required by Mrs. Boss so to do; and it was declared, that they should a change had not be liable in respect of any advance to be so made.

The marriage took place in 1837. In 1838 the husband husband, as was arrested and took the benefit of the Insolvent Debtors' Act. In the following year Mrs. Boss made an application cable to him, in writing to Godsall to advance £80, part of the trust fund, to Boss, on the security of his bond, according to the proviso in the settlement. This he refused to do.

June 29th.

tlement, trustees were empowered and required, at the request in writto advance part of the trust-monies to the husband on the sebond. After the marriage the husband was arrested, went to prison, and took the benefit Debtors' Act. The wife then applied to the trustee for a It was also loan to the husband, according the settlement: Held, that such taken place in the circumstances of the rendered the clause inappliand consequently that the trustee was justified in refusing to lend the money.

Boss v. Godsall. The bill was filed by Mrs. Godsall, for the purpose of having Godsall removed from his office of trustee. It appeared from the plaintiff's evidence, that at the time of the marriage Godsall was, unknown to the plaintiff, a creditor of the husband, and that since the marriage he had applied to have his debt secured on Mrs. Boss's jointure. Evidence was also given of conversations of Boss, in which he had said, that if the security was not given he would put the case in chancery, &c.

Mr. Simpkinson, (with whom was Mr. Elderton), for the plaintiff, after commenting on the other circumstances of the case, observed, that though it is the practice for an insolvent, in taking the benefit of the act, to give a judgment to be dealt with as the Insolvent Debtors' Court may think fit, yet that judgment is never made available to the antecedent creditor, where there are subsequent creditors; therefore the circumstance of the husband having taken the benefit of the Insolvent Act could not affect this case. By the settlement, the wife was constituted the sole judge of the propriety of lending the money. At her request the trustees were required to lend it.

Sir Charles Wetherell and Mr. Parker, for the defendant Godsall.

Mr. Wilcock, for the assignee under the Insolvent Debtors' Act.

Mr. Russell and Mr. Jolliffe, for other parties.

THE VICE-CHANCELLOR—(after disposing of a question of parties).—The first complaint against the defendant is, that he refused to obey the requisition of the wife to lend the money on the bond of the husband, which, but for the circumstances of the case, it would, according to a particular

clause in the settlement, have been his duty to do. When, however, the marriage took place the husband had not taken the benefit of the Insolvent Debtors' Act. Subsequently he did so, and then this application was made to the trustee. I am of opinion, that so total a change took place in the circumstances and position of the husband, as that the clause in question became no longer applicable to him; that it ceased therefore to have any effect, and consequently that the trustee did his duty when he refused to lend the money. In expressing this opinion, I allude to the circumstance, not merely of the husband's insolvency, but that being a prisoner for debt, he took the benefit of the Insolvent Debtors' Act.

As to the other circumstances of the case, I am not entirely satisfied with the conduct of the trustee. Without going the length of saying, that I believe that Mr. Godsall uttered all the expressions which he is supposed to have uttered, and without believing that he intended anything improper, it is impossible to avoid seeing this—that Mr. Godsall being trustee for the plaintiff for her separate use, which alone ought to have restrained him from so acting, was desirous of having, and made a proposition for having, his debt secured upon the life-interest of the married woman for whom he was trustee. It is impossible to say that this was a correct mode of proceeding, or one which can receive the sanction of the Court. Looking, however, at all the circumstances of the case, I think the removal of Mr. Godsall would be attended with more harm than good. It might, indeed, produce the very effect which it is desirable to guard against; namely, the advance of the money. The bill, therefore, must be dismissed, but without costs.

Boss •. Godsall.

June 29th.

ESSEX v. BAUGH.

The executor of BY an indenture, dated the 9th September, 1828, and made on the marriage of Robert Fraser with Hannah Meller, a house in Grosvenor-street, the property of the wife, which was held under a lease from Earl Grosvenor for sixty years by virtue of an indenture dated in 1800, was assigned to the trustees of the settlement, in trust for the separate use of Mrs. Fraser for life, without power of anticipation; and after her decease, upon trust for Robert Fraser for life, with a proviso for the forfeiture of his interest in the event of his becoming a bankrupt, and after decease of the survivor of the husband and wife, upon certain trusts, for the children of the marriage.

Soon after the execution of this deed, a memorial of it was entered on the register.

In 1830, Fraser and his wife having the original lease in their possession, mortgaged it to Mrs. Canham, by an indenture dated in August of that year.

The mortgage-deed was registered immediately after its execution.

In the year 1833 Mrs. Canham died without ever having had notice of the marriage settlement. She, by her will, appointed the plaintiff her executor.

In December, 1834, Fraser became bankrupt, upon which occasion the plaintiff for the first time received notice of the settlement.

The plaintiff, conceiving that the memorials, both of the settlement and of the mortgage, were defective in not describing the house, and the parish (a) in which the house was situate (although there was a reference in both memo-

notice of the prior incumbrance, may, by properly memorializing his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective.

(a) See 7 Ann. c. 20, s. 6.

a mortgagee, a memorial of whose security was registered under the Middlesex Registry Act, conceiving that the memorial was invalid, affected to reexecute the mortgage deed, by signing and sealing it himself in the presence of two witnesses, whose names were indorsed as witnesses attesting his execution of it. Neither of

had attested the execution of the deed by any of the other parties. After this ceremony the executor memorialized the deed in due form :--Held,

that the whole

the witnesses

course of proceeding (which was said to be in accordance with the practice before the registrar) was nugatory for the purpose of the Registry

Act. A subsequent incumbrancer, who at the time of taking his

security, has no

rials to the parcels as described in the original lease), endeavoured, with a view to give the mortgage priority, to correct the memorial of it in the following manner: he signed his name in the mortgage-deed under that of his testatrix, Mrs. Canham, and at the same time caused his execution of it to be attested by two witnesses, such wit nesses, however, not having previously attested the execution of the deed by any of the parties to it. He then placed on the register a memorial of the mortgage-deed with a proper description of the house and parish, such memorial being attested by the two witnesses.

Essex v. Baugh.

The memorial so entered was considered to be in conformity with the provisions of the fifth section of the stat. 7 Anne, c. 20. [See the judgment, post, p. 623.]

The plaintiff now brought his bill against the trustees under Mrs. Fraser's marriage settlement, Mr. and Mrs. Fraser, their infant children, who took interests under the settlement, and the assignees under Fraser's bankruptcy, praying for the establishment of the priority of the mortgage-deed to the settlement, and for the foreclosure of the mortgaged premises.

Mr. Wigram and Mr. Bagshawe, for the plaintiff, relied on the practice in the registrar's office, which they said warranted the course which the plaintiff had taken, and they cited Rigge on Registry, p. 76. They then contended that, assuming the plaintiff's title to be established by his re-execution and second memorial, it must prevail against the title of the trustees, inasmuch as their memorial was not in the form prescribed by the 6th section of the statute, and was not within the provision of the 7th section.

Mr. Temple, (with whom was Mr. Wilcock), for the trustees, relied on the observations of Sir Edward Sugden on the practice of the registrar's office as stated by Mr.

Essex v. Baugh. Rigge (a). He also contended, that, independently of the question whether the second memorial was good or bad, the plaintiff had memorialized after having had notice of the prior security. [The Vice-Chancellor.—But he had not notice till he had paid his money and taken a conveyance.] It has not, perhaps, been decided that notice between the execution of the deed and the registration of the deed is available notice; but there are dicta of Lord Hardwicke, Lord Alvanley, and Sir William Grant, to that effect: Hine v. Dodd (b); Jolland v. Stainbridge (c); Wyatt v. Barwell (d). The plaintiff had recourse to the second registry for the purpose of defrauding the trustees of their title.

Mr. Koe for the defendants, Fraser and wife.

Mr. Chandless, for the defendants, the assignees, observed, that by the terms of the settlement, Robert Fraser's interest ceased on his becoming a bankrupt. He therefore, on behalf of the assignees, absolutely disclaimed all interest in the subject of the suit.

Mr. Wigram, in reply.

In the course of the reply, the Vice-Chancellor observed, that he did not think the judges, whose dicta had been referred to, adverted in them to a case like the present. His Honor thought, that the course which the plaintiff had taken was not more objectionable than that of a purchaser without notice of a prior incumbrance, who, upon afterwards having notice, gets in an outstanding term.

<sup>(</sup>a) See Sug. V. & P. Vol. 3, p. 351.

<sup>(</sup>c) 3 Ves. 485. (d) 19 Ves. 439.

<sup>(</sup>b) 2 Atk. 175.

THE VICE-CHANCELLOB.—Had the question in this case turned alone on the insufficiency of the memorial of the settlement. I should have sent a case to a court of law. As the matter, however, stands, there is no occasion to take The marriage settlement being a contract for valuable consideration, and prior in time to the mortgage, it is prior in title to it, unless the priority is changed by the effect of the act of Parliament. Now, the act of Parliament provides, that "every such deed or conveyance that shall at any time after the said 29th day of September, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." The memorial mentioned in the second part of the section must, I apprehend, be the same as that mentioned in the former part. The 5th section provides that the memorials so to be entered and registered shall, in the case of deeds and conveyances, "be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors, or administrators, guardians, or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance; which witness shall, upon his oath, before one of the said registers, &c., prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial." Now, in this case the memorial, on which reliance is placed, was attested by two witnesses, neither of whom attested the execution by any of the parties to the mortgage-deed, unless it can be said that they attested the execution in this way: - Mrs. Canham being a party to the mortgage-deed, and having died, her executor takes upon himself to go through the somewhat absurd ceremony of signing and sealing the deed, and having such

1842.

ESSEX v. BAUGH. Essex v. Baugh. signing and sealing attested by two witnesses. These, it is said, were witnesses to the execution of the deed. It is hardly possible to speak seriously on the point. It is clear that this second memorial was not such a memorial as satisfies the provisions of the act.

· Then, putting the two first memorials out of the question. there was no memorial at all, and if there was no memorial at all, the prior title, namely, that under the settlement, must prevail. On the other hand, admitting the validity of those memorials, the parties claiming under the settlement have not only a prior title but a prior memorial also. Collecting from Mr. Rigge's book, and from what has been stated by counsel, that the practice in the office has been in accordance with the course taken by the plaintiff, I at first was disposed to think that, whatever my own opinion might be, it would be better to direct a case for the opinion of a court of law. Considering, however, that another book of great and deserved celebrity has been in the hands of the profession for more than twenty-five years, in which the doctrine advanced by Mr. Rigge has been disputed and denied, I think I may act on my own opinion. Therefore—

Dismiss the bill with costs as against the infants, and without costs as against the defendant, Mrs. Fraser. The assignees of the bankrupt absolutely disclaiming all interest in the suit, let them have their costs. Usual decree of foreclosure against the bankrupt.

### DRYDEN v. WALFORD.

MR. KEENE, for the defendant, moved that the personal Upon the death representative of the deceased sole plaintiff, might be ordered to revive the suit within a limited time, or that the declined to bill might stand dismissed.

Upon the Vice-Chancellor expressing a doubt whether such an order ought to be made-

of a sole plaintiff, this Court make an order that his representatives should revive within a certain time, or the bill stand dismissed.

Mr. Chandless, amicus curiæ, said, that in Chowick v. Dimes (a), the Master of the Rolls had, upon a review of all the authorities, made such an order; and that in Canham v. Vincent (b), the Vice-Chancellor of England, adopting the practice of the Master of the Rolls, had reversed a previous order of his own, in which he had decided differently (c).

THE VICE-CHANCELLOR said, that in his opinion such an order as that now asked for could not be made consistently with the practice of the Court; and that as there appeared to be no other authority for it than the very recent cases which had been mentioned, he should decline to make the The party, of course, could, if he pleased, make an application to the Lord Chancellor on the subject (d).

<sup>(</sup>a) 3 Beav. 290.

<sup>(</sup>c) 8 Sim. 277.

<sup>(</sup>b) Ibid., cited.

<sup>(</sup>d) See Lee v. Lee, 1 Hare, 617.

Manson v. Burton.

Upon the bankruptcy of a defendant in a co-partnership suit, the Court declined to make an order that a supplemental bill should be filed within a given time against the assignees, or the bill stand dismissed.

THE bill was filed by partners against their co-partner, for an account of the partnership dealings and transactions.

Mr. Rogers, for the defendant, who had become bankrupt, moved that the plaintiff might either file a supplemental bill against the assignees within a given time, or that the bill might stand dismissed with costs. He cited Smith, Ch. Pr. Vol. i, p. 328; Monteeth v. Taylor (a); Rhode v. Spear (b).

Mr. Toller, for the plaintiffs.

In answer to a question from the Court, Mr. Rogers admitted that the time had not yet arrived at which, in the ordinary course, the bill could have been dismissed for want of prosecution; but he said that the plaintiffs had not filed their replication till after the bank-ruptcy.

THE VICE-CHANCELLOR.—This application is a pure novelty. The motion must be refused.

(a) 9 Ves. 615.

(b) 4 Madd. 51.

July 4th.

## ADAMS v. BROKE.

BARBARA COCKAYNE MEDLICOTT, by her will, Where by the dated the 20th February, 1888, gave and devised all her vise or settleestate in Rowell in the county of Northampton (except Hall farm) to the use of the Rev. W. Cockavne Adams. the Rev. John Wetherall, and John West, Esq., their heirs and assigns, during the life of her daughter Caroline Elizabeth, wife of Thomas Philip Macneil, in trust for her separate use, and after her decease, to the use of the first and trustees to comother sons of the said C. E. Macneil by her said husband, successively in tail male, with remainders over. And the testatrix declared that it should be lawful for the said trustees and the survivors and survivor of them. and the heirs of such survivor, at any time or times thereafter, at the request and by the direction of the said C. E. Macneil, during her life, testified by some writing under her hand and seal, and attested by two or more credible witnesses, to dispose of and convey, either by way of absolute sale or in exchange for other hereditaments, all or any part of the said hereditaments thereinbefore devised, immediate desituate in Rowell aforesaid, and the inheritance thereof in that such confee simple, to any person or person for such purpose or purposes as to the same trustees, or the survivors, &c. should seem reasonable. And the testatrix devised all her messuages and hereditaments in Great Oakley and Pipwell, in the said county of Northampton, and all other her messuages, lands, tenements, and hereditaments not thereinbefore devised, unto and to the use of the said trustees, their heirs and assigns, upon certain trusts therein declared, as a collateral fund in aid of her personal estate for the payment of certain legacies, and subject thereto to such uses and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as were thereinbefore declared concerning the

terms of a dement of real estates, the consent of the tenant for life is necessary to enable the trustees to sell the estates ;---upon a bill filed by the pel the specific performance of a contract for sale, the plaintiffs, in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent to the contract was given before the filing of the bill. It is not sufficient for the purpose of obtaining an cree, to prove sent was given before the hearing.

The contract on which an immediate decree for specific performance is sought, must have been complete in all its essential parts before the filing of the bill.

ADAMS
v.
BROKE.

estates at Pipwell, except that, immediately after the death of her daughter, the said hereditaments should be held in trust for the said T. P. Macneil for his life, if he survived his said wife, and it should be lawful for the said C. E. Macneil to appoint the said hereditaments to or amongst any one or more of her said sons; and also that, after the decease of the said C. E. Macneil, and during the life of the said T. P. Macneil, the said hereditaments should, with the consent of the said T. P. Macneil, be capable of being sold or exchanged in the same manner as the same might be sold or exchanged in the lifetime of the said C. E. Macneil, with her consent, and at her request in writing.

The testatrix died, leaving the devisees named in her will surviving her.

On the 21st December, 1841, an agreement in writing of that date was signed by the two surviving trustees, Adams and Wetherall, on the one side, and William De Capel Broke, on the other, for the sale by the former to the latter of the Great Oakley and Pipwell estates for £18,500.

The defendant having refused to complete the purchase, the present bill was filed against him, to compel the specific performance of the contract. Upon the cause originally coming on for hearing, the *Vice-Chancellor* took notice that it did not appear that the contract was entered into with the consent of C. E. Macneil; and, by consent, the cause was allowed to stand over, that the plaintiffs might consider that point.

The cause now came on again for hearing, when the plaintiff's counsel produced a deed, executed by C. E. Macneil, and dated the 28th June, 1842, which was subsequent to the original hearing, whereby it was declared that C. E. Macneil ratified the contract. The deed was proved by affidavit.

After some discussion as to the admissibility of this evidence, the deed was read by consent.

ADAMS

Mr. Swanston and Mr. James, for the plaintiffs.—We submit that it is immaterial when the consent is obtained. It has been decided at law, that an action cannot be maintained against a lessee for assigning without a license, merely because the license was not obtained before the day when possession ought to have been given: Stowell v. Robinson (a). The principle of that case applies here. What has been done is in accordance with the practice of the court: Paton v. Rogers (b); Hoggart v. Scott (c.) It is sufficient if a good title is shewn at the hearing. Besides, according to the terms of the will, it is sufficient if the married woman "dispose and convey." Her consent to the contract of the trustees is not necessary.

Mr. Wigram and Mr. Reynolds, for the defendant.

THE VICE-CHANCELLOR.—An estate is placed in strict settlement, which the trustees have power to sell and withdraw from the settlement with the consent of a married lady, to be given under her hand and seal, and to be attested by two or more witnesses. The main branch of the argument has been, that this Court is to regard the contract on which the case is to be sent into the Master's office as a contract by the two trustees; without any evidence of consent by the married lady, as required by the deed, or even in writing. It is impossible to say that the consent of the tenant for life is merely formal matter. As between the tenant for life and the trustees, one is a check upon the other. The estate is not dealt with for the purposes of sale, till there is a contract by the two trustees with the consent of the wife. I

<sup>(</sup>a) 3 Bing. N. C. 355.928 (b) 6 Madd. 256 (c) 1 R. & M. 293.

ADAMS
v.
BROKE.

do not say that this consent must be contemporaneous with the act of the frustees, but till there is such consent there is no contract. Here the plaintiffs bring forward a case in which, at least up to the time of filing the bill, no contract has been proved. Whether, under the circumstances, that is a sufficient ground for dismissing the bill is another thing. That has not been the contention. The contention has been, that the Court ought to send this case to the Master's office without evidence of the consent of the tenant for life to the contract. In point of form, I cannot at this moment look at the instrument which is said to amount to a consent on Therefore her part.

Inquirae whether Mrs. Macneil consented to the contract, and whether the trustees entered into it at her request, and by her direction, and whether such request and direction have been expressed by writing under her hand and seal, attested by two witnesses. And if the Master shall find in the affirmative, declare that the contract ought to be specifically performed, and refer it to the Master to inquire whether a good title can be made, and when it was first shewn.

4. 10 Jan . 57

1842.

HARVEY COMBE, JOSEPH DELAFIELD, AND WILLIAM DE- June 2nd, 9th.

Plaintiffs. LAFIELD

and

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON, JOHN HURCOMBE, AND JOHN EAYRES, AND HENRY WOODTHORPE Defendants.

IN July, 1839, the Mayor and Commonalty and Citizens In a suit instiof the city of London filed their bill against the present plaintiffs, who were partners and brewers in the Savoy, in St. Martin's in the Fields, Westminster, which, after aid of a defence alleging that the citizens of London had, for a very long period, enjoyed great and extensive privileges, which had been conferred upon them by royal charter, and many valuable rights and privileges by custom and prescription, which title by prehad from time to time been confirmed and sanctioned by charters and acts of Parliament, contained the following statements:—That the corporation of London and their predecessors, from time immemorial, have been legally entitled to exercise and enjoy, and have of right exercised and enjoyed, the office of measurer and measuring of all grain of whatsoever kind, and also of all kinds of salt, and formed part of of allkinds of apples, pears, plums, and other fruit whatsoever, and also all kinds of roots eatable, and of onions, evidence against and of all mercantile wares and things whatsoever measurable, in or unto the port of London coming, carried, or did not with brought upon the water of Thames, in whatsoever ship, barge, boat, or vessel, floating, laden, and being on what-

3. Horse, 125.

tuted against the Corpora-tion of London for discovery, in to a bill brought by them for an account of certain alleged dues to which they claimed a scription, the corporation admitted the possession of certain charters, books, and documents relating to the matters in question, which they alleged their title, and were intended to be used as the plaintiffs, but which they sufficient precision deny might form part of the plaintiffs' title, or con-

tain matter impeaching their own defence :-- Held, that the plaintiffs in the bill of discovery were entitled to the production of such documents.

To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or contain evidence which he intends or is entitled to use in support of his case; it must contain no matter supporting the plaintiff's title or the plaintiff's case, or impeaching the defence, and the defendant must aver by his answer, with a reasonable degree of distinctness, that the document does contain no such

Production of cases and opinions of counsel thereon, relating to the matters in issue, refused.

Combe 9. Corporation of London.

soever part of the said water of Thames, and upon whatsoever bank, shore, or wharf of the said water of Thames,
which shall come to, arrive, abide, be delivered or laid
down from the bridge of the town of Staines, westward to
the bridge of London, and from thence to the place called
Yendall, otherwise Yantlet, towards the sea and east, and
in Medway, and in the said port of the city of London
aforesaid, and to exercise and occupy the same office by the
mayor of the said city for the time being during the time
of his mayoralty, or by his sufficient deputies; and also for
all the time aforesaid have had and taken, and ought to
have and take, to their proper use by the mayor of the said
city for the time being during his mayoralty, or by his sufficient deputies, all wages, rewards, fees, and profits, to the
same office belonging.

The bill then, after setting forth a charter of the 3rd Jac. 1, whereby the alleged right of the corporation was stated to have been confirmed, alleged in substance as follows:-That the port of London extends from Yantlet to Staines Bridge; that the corporation and their predecessors have been, from time immemorial, and are conservators of the river Thames and port of London; that a competent number of proper persons have, from time immemorial, and at all times, been appointed by the corporation and their predecessors to discharge the duties of measurer: that such persons, called corn-meters, are duly sworn, and have from time immemorial attended and do still attend at proper places of resort in London, Southwark, and Middlesex, with proper implements, &c., to receive orders for measuring corn, malt, and grain, brought on the river Thames, and unloaded within the port of London; and that they have always performed and continue to perform faithfully their duties as such cornmeters; that there has been from time immemorial an ancient office in the city of London, called the Cocket Office, and that it is now and has from time to time from

time immemorial been the custom and practice for all persons bringing corn, malt, and grain, by the river Thames eastwards into the port of London, to be unladen within the limits of the said port, and their duty, to cause an entry to be made at the said Cocket Office, expressing the name of the ship or vessel, together with the description and quantity of the corn, malt, and grain therein contained, and intended to be unladen within the port aforesaid, and to obtain a Cocket warrant or permit from and under the hand of the lord mayor of the said city for the time being directed to the corn-meters, authorizing and directing them to mete and measure such corn, malt, and grain; that upon the receipt of such warrant, one or more of the said meters have always attended, &c., and that the corporation have immemorially claimed, asserted, and enforced such right of metage; and that they or their deputies have, time out of mind, had, claimed, demanded, and received, and been paid, a certain ancient fee anciently due and accustomed, to wit, one halfpenny for every quarter Winchester measure, or quantity corresponding therewith, of British and Irish grown corn, malt, and grain, and measurable seed brought in manner aforesaid, and unloaded within the port of London; and that besides the said ancient fee or duty, there have been from time to time from time immemorial certain other reasonable fees or wages and rewards payable and paid by the several and respective importers of such corn, malt, and grain, and measurable seeds, to the corporation and their predecessors, in respect of the work and labour of measuring, or being ready and willing to measure, such corn, malt, and grain, vis. 8d. for every last of light grain, and 10d. for every last of heavy grain (in the name of fillage), and 1d. for grain imported into the port of London eastward of London Bridge, except from Essex and Kent, (in the name of lastage).

The bill then, after alleging that the present plaintiffs had landed at their wharf in the Savoy large quantiCOMBB CORPORATION OF LONDON. COMBE 9.
CORPORATION OF LONDON.

ties of malt from Yarmouth and other places, part of which they had consumed in the way of their trade, and part of which they had sold, without giving notice to the corporation, or to the corn-meters, or at the Cocket Office, and without obtaining such warrants, or paying such fees as aforesaid, prayed for an account of the malt so disposed of since the year 1833, and of the sums due to the corporation from the present plaintiffs in respect of such ancient and accustomed fees, wages, and rewards, and their said office of measurer; and, if necessary, that the right of the corporation to such ancient fees, wages, and rewards, and the said office of measurer, might be established by the decree of the Court.

To this bill the plaintiffs put in their answer, and likewise filed a cross bill for discovery of documents. The substance of their case, as alleged by their answer and cross bill, was this:-That the right of metage claimed by the corporation had no legal origin; that such claim commenced long since the time of legal memory, and that the exercise of it, so far as it had been exercised, was of modern origin; that in the time of Henry the Third, the only port in London at which corn could be landed was Queenhithe, to which place, under an order of the seventh of that reign, foreign ships (or vessels not belonging to the citizens of London) were compelled to unload their corn, and to pay certain dues for the use of the king; that this order did not affect citizens who imported corn; that by a covenant of the 30 Hen. 3, between the Earl of Cornwall and John de Gysors, then mayor of London, and by a charter of confirmation of the 31 Hen. 3., Queenhithe was granted to the Mayor and Commonalty of the city of London, who then first took possession of it: that they thenceforth, to the time of King Edward IV., used and enjoyed Queenhithe as the only or principal place for the landing of corn in London by the river Thames, and for the sale of such corn; that after the charter was so granted, and possession was so taken, the corporation for the first time appointed a body of men to measure and carry corn, grain, and other articles brought into London by citizens; that such office of measuring and carrying was instituted and practised for the sole convenience of the said citizens, or the inhabitants of the said city, and was not a franchise of the corporation, and that strangers could not require the measurement of articles imported by them, without a licence from the bailiffs of Queenhithe; that this, and also the rates for metage, appeared from an inquisition taken before Elias Russell, Mayor of London, in the 29 Edw. 1, (set out in the bill); that the rates and dues now claimed for metage far exceeded those mentioned in the finding to such inquisition: that there was no documentary evidence respecting the customs or dues of measuring and carrying corn and grain and other articles of provision, landed in the city from vessels on the Thames, more ancient in date than the aforesaid inquisition and finding; that it appeared from an act of common council of 3 or 4 Edw. 4, (set out in the bill), that Billingsgate, as well as Queenhithe, was then a public market; and that they were then the only public markets for the sale of corn, grain, and other articles imported as aforesaid; that it appeared from the before-mentioned inquisition and finding of 29 Edw. 1, and from an order of the court of aldermen and report thereon in the 8 Eliz., and from a proclamation of 9 Eliz., and from a charter of 3 Jac. 1, (20th September, 1609), (all set out in the bill), and the fact was, that the right of the corporation (if any) to measure corn, malt, and other grain for citizens, and to demand fees or wages in respect thereof, was limited to such of the last-mentioned particulars as were brought by way of the river Thames to the city of London to be there sold in public market; that, except upon license, there was no custom to measure corn, &c. for strangers till long after the 29 Edw. 1, and no claim of any right of metage

COMBE

U.

CORPORATION
OF LONDON.

Combe

at private wharfs within the city until long after the charter of 1 Jac. 1, mentioned in the defendant's bill; that it appeared by the books of the corporation, and their deputies, and the fact was, that, until late years, the corporation did not claim metage beyond the local limits of the city; that the claim of metage to the westward of the local limits was not made till about thirty years ago, and in many instances, as would appear from books and papers in possession of the corporation, had been defeated or submitted to through fear or misapprehension of the rights of the parties; and that the claim of metage in private wharfs westward of the local limits of the city had not been made till about ten years since.

The bill of discovery then, after stating that the right of metage claimed by the defendants' bill was co-extensive in point of locality with a certain claim of porterage of corn, &c. set up by the fellowship of porters of Billingsgate as appointees of the corporation, proceeded to set forth shortly the purport and object of a bill filed in October, 1830, by the corporation and the fellowship of porters against the present plaintiffs to establish such claim of porterage. (See the substance of that bill stated, Younge & Collyer's Reports, Vol. IV. p. 139.)

The bill of discovery then alleged that the defendants, the corporation, and the other defendants thereto, and the fellowship of porters, consisting in part of the said cornmeters, (as members of the said fellowship, and in that character alone), had in their possession, custody, or power divers accounts and books of account, in which entries had been made of all corn, malt, and grain, and other articles measured by the said corn-meters during a long series of years, together with the names of the persons on whose behalf and the times and places at which such measuring had been made, and the fees and wages for such measures; and that the defendants, the corporation, and the other defendants, had access to such accounts and books of

account, and were entitled to inspect and copy the same; and that if such books and accounts were produced it would thereby appear that the right of measuring corn, malt, grain, and other articles, claimed by the corporation, had not been exercised at any place above or to the west of the city of London longer than thirty years last past; and that at some of the places, at which corn, malt, and other grain had been imported for a long series of years between Staines Bridge and the city aforesaid, it had not been exercised longer than three or four years last past, and that at others of such last-mentioned places it had never been exercised at all; and that such alleged right had not been exercised until late years at any of the places lying on the banks of the said river Thames, below or to the east of the said city, although at many of such places, corn, malt, and grain had, from time immemorial, or for a long series of years, been imported and landed from vessels on the said river Thames; and it would further appear, from the said books and accounts, if produced, that the rates of fees, wages, and rewards claimed and received on account of the metage aforesaid, and the labour incidental thereto, had from time to time varied.

The bill of discovery further alleged that John Hurcombe and John Eayres, defendants thereto, were respectively members of the corporation of the city of London, the former holding the office of clerk of the corn-meters' office, and the latter the office of clerk at Brook's wharf for the corn-meters, and that they were respectively agents of the corporation, and of the said fellowship, or of the said corn-meters; and that, on their behalf, they had the care and custody of all books, accounts, and papers relating to the metage in question, and the work which had been done and the fees which had been received in respect thereof; and that Henry Woodthorpe, a defendant thereto, was a member of the said corporation, and held

COMBE

U.

CORPORATION
OF LONDON.

COMBE v. Corporation of London.

the office of town-clerk of the said city and corporation. and was their agent, and as such had the care and custody of all the archives, deeds, records, muniments, papers, and evidences, relating to the matters aforesaid. The bill then, after enumerating several charters and other ancient documents, most of which have been before referred to, charged that the defendants, the corporation, and the other defendants thereto, had in their possession, power, or custody, copies or abstracts of, or extracts from all the said several last-mentioned documents, or knew where the same, or copies thereof, were to be found, and ought to discover the same; and that they had in their possession, power, or custody, some printed or other books, repertories, archives, papers, and evidences, in which the aforesaid particulars or documents were set forth, in whole or in part, or were recorded and mentioned; and that they also had in their possession, custody, or power, some documents, or copies, or abstracts thereof, or extracts therefrom, relating to the dues and charges received by the bailiffs, or other officers of Queenhithe aforesaid, for or on behalf of the king, or knew where the same were to be found: and that the defendants, the corporation, possessed certain written or printed books, and certain repertories, in some of which were entered or to be found divers notices, statements, histories, and copies, or abstracts of documents, or extracts therefrom, respectively relating to Queenhithe and Billingsgate aforesaid, and the several documents thereinbefore mentioned, and the measuring and carrying of corn and grain by the meters and porters aforesaid. The bill then charged that all the defendants had in their possession, custody, or power, divers cases and opinions of counsel relating to the right of measuring, &c., which were prepared and answered long before the matter now in dispute between the parties was agitated between them, and which ought to be produced, &c.

The defendants, Hurcombe and Eayres, by their answer. admitted that all the books of account, and accounts relative to the metage, had been for some time past kept by them. They denied that if the said books of account were produced, it would appear that the right of metage claimed by the corporation was not exercised at any place above or to the west of the city longer than thirty years ago. They then mentioned several places to the west of the city, as Kingston, Battersea, &c., at which metage had been done at an earlier period, as to which there were entries in the books, and they set forth the earliest entries respecting the metage at those places. They stated, that it had not been the practice to specify in the entries, relative to metage below or to the eastward of the city, the names of the particular places where the metage was done. a subsequent part of their answer they stated, that "they have hereinbefore set forth and discovered the names of all places on the banks of the said river, other than those which are in the said city of London, at which the exercise of the said right of metage is shewn or appears by any entries in the said books of account, which these defendants have met with; but these defendants say, that such books of account are numerous, and may contain the names of many other places than such as are hereinbefore mentioned at which the right of such metage has been exercised; but save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the rates of the fees, wages, and rewards, claimed or received on account of the metage aforesaid, or the labour incidental thereto have, from time to time, or at any times or time varied; and save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that in fact the rates of the said fees, wages, or rewards for such metage as aforesaid, or the labour incidental thereto,

COMBE T. CORPORATION OF LONDON. COMBE 5.
CORPORATION OF LONDON.

or any or either of them, have or has, from time to time, or at any time or times varied, or that the fees, wages, or rewards now charged in respect of metage, except the said fee of 8d. and 10d. in the name of fillage, or any or either of them, have not always been uniform, or have not existed from time immemorial," &c.

The defendants, the corporation of London and Henry Woodthorpe, by their answer, denied the principal allegations contained in the bill of discovery relative to the claim in question. With respect to the metage books, they averred as follows:--"And these defendants say. that all the books of account and accounts relative to metage are kept by the respective persons hereinafter named, and none of such books of account or accounts are in the actual possession or custody of these defendants, or either of them; and these defendants have not had occasion for many years to examine or inspect the same, except that these defendants, the mayor, &c. (a). say, they have lately caused the said books of account and accounts to be examined, and the same relate to dues and wages and receipts of the said corn-meters. for the metage of corn and grain in exercise of the said right; and such books of account contain entries which these defendants, the mayor, &c., are advised and believe form most material evidence in support of their exclusive right of metage within the limits aforesaid, and which books of account these defendants last named intend to make use of in evidence, on the hearing of the cause between these defendants last named and the said plaintiffs, in support thereof. However, these defendants, the mayor, &c., say, that they have hereinafter set forth, according to the best of their knowledge, information, and

<sup>(</sup>a) The words "Mayor &c." are intended to express "The Mayor and Commonalty and Citi-

zens of the City of London," without the defendant, Henry Wood-thorpe.

belief, the earliest entries in the said books of account respecting such metage." The defendants, at a subsequent part of their answer, stated, that the earliest entries respecting such metage at private wharfs west of the city, in such books of account, were in the words and figures following, that is to say:—1789, January 16th, Isaac Streley, Windsor, Melford Lane, &c.; "but they believe that many of the older books of accounts have been lost. And these defendants say, that the said books of account now in existence are numerous, and these defendants have not met with any entries therein of metage done at any private wharfs westward of the said city of London, except at such several places as are hereinbefore mentioned."

In a subsequent part of their answer, the defendants stated as follows:--"They believe it to be true, that the corn-meters have in their possession, subject to the inspection of these defendants, the mayor, &c., divers books of account, containing entries of, or relating to all, or the greater part of the corn, malt, and grain which have been measured by them, or by the corn-meters of the city of London since the year 1699; and that such books of account are deposited in the office or place of resort of the said corn-meters, situate at Great Tower Street and Brook's Wharf, in the said city of London, and are in the possession of the said John Hurcombe and John Eayres; and these defendants admit, that these defendants, the. mayor, &c., have access to the said books of account, and are entitled to inspect and take copies of the same; and these defendants, the mayor, &c., say, that they never in fact, until after they were called upon to put in their answer to the said bill, inspected the same, the same having been kept entirely by and under the sole inspection and control of the said corn-meters, whose interests the said books relate to and concern. And these defendants say, that none of such books are or is in the actual custody or possession of these defendants, or any of them;

COMBE 9.
CORPORATION OF LONDON.

Combe v. Corporation of London.

but these defendants believe, that all of such books as now exist are in the actual possession and custody of the defendants. John Hurcombe and John Eavres, or one of them. And these defendants admit, that the said books have been kept by the said corn-meters, as the deputies of the said corporation of London; and that some of the said books of account do contain entries of the names of some of the persons on whose behalf, and of some of the places at which such measuring has been made, and of some of the respective times, since the year 1699, when such measuring was done, and of some of the fees, wages, and rewards received for such measurings respectively." &c. "And these defendants, the mayor, &c., say, that such of the said books of account as they have caused to be inspected, as hereinbefore is mentioned, and as they have been informed and believe are now known to exist, do not go further back, and do not contain any entry of an earlier date than the year 1699. And these defendants deny, that if the said books of account were produced, it would appear thereby, or by any or either of them, that the right of metage claimed by the bill of these defendants. the mayor, &c., was not exercised at any place above, or to the west of the said city of London, longer than thirty years ago. And these defendants, the mayor, &c., say, that the earliest entry in the oldest of the said books of account known to the defendants last-named. &c., is &c. And these defendants, the mayor, &c., deny that it would appear by the said books of account, or any or either of them, if produced, that the said right or franchise of metage was not exercised, &c., between Staines Bridge and the said city of London respectively, longer ago than three or four years from the time in the said bill in that behalf mentioned: and these defendants say, that the earliest entry in the said books of account, or any of them, known to these defendants last named, of the exercise of the said right of metage at Kingston, is in the words and figures following, &c. And these defendants say, that the earliest entry in the said books of account, or any of them, which these defendants have met with of the exercise of the said right of metage at Wandsworth, is in the words and figures following." &c. Then followed similar allegations as to metage at Battersea, and other places.] "But these defendants, the mayor, &c., say, that it does not appear by the said books of account, or any of them, as they believe, and these last-named defendants have no means of knowing whether the metage, which was done at the several and respective towns and places hereinbefore mentioned above, or to the west of the said city of London, was done at public or private wharfs there, or at what particular wharfs or places such metage was done; and although these defendants, the mayor, &c., say they have not discovered any entries or entry in such books of account, or any or either of them, of the exercise of such right of metage at Chertsey, &c., yet these defendants believe that such right of metage has been always exercised at such several last-mentioned places, &c.: and these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the said right of metage has not been exercised at any of the places lying on the banks of the said river below, or to the east of the said city, until late years."

The defendants, the corporation, then stated their belief, that it had not been the practice to enter in the books of account the names of places in respect of metage done below or to the east of the city of London, such metage usually taking place on board the vessel, &c.: and the defendants, collectively, stated their belief, that the earliest entry which they had met with as to metage below the city was thus—"April, 1699, &c.;" and they believed that very little of any corn, &c., was landed between Staines Bridge

COMBE

COMBE

CORPORATION
OF LONDON.

COMPUTATION OF LOWDON.

and Yantlet, where the corn-meters had not exercised, and did not continue to exercise, the right of metage. "However, for the reasons herein mentioned, these defendants do not know, and cannot set forth as to their belief or otherwise, whether the said books of account, or any of them, do or does contain any entry whatever relating to the exercise of the said right of metage at any or either of the towns or places in the said bill named, or other towns or places on the banks of the said river between Staines Bridge and Yantlet Creek aforesaid, except such as are hereinbefore in that behalf mentioned: and these defendants, the mayor, &c., say they have hereinbefore set forth and discovered the names of all places on the banks of the said river, other than those which are in the said city of London, at which the exercise of the said right of metage is shewn or appears by any entries in the said books of account which these defendants have met with: but these last-named defendants say, that such books of account are numerous, and may contain the names of many other places than those which are hereinbefore mentioned at which the right of metage has been exercised; but save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the rates of the fees, wages, or rewards, claimed or received on account of the metage aforesaid, or the labour incidental thereto, have from time to time, or at any times or time, varied."

In answer to the charges of possession of documents the defendants denied that the act of common council, proclamation, report, and orders, related to the claim of metage or porterage, or any of the matters in question. They also denied, generally, the possession of documents relating to the matters in the bill mentioned, "except that these defendants say, there are in the custody, power, or possession of these defendants certain written books and repertories, which

are mentioned and set forth in the first schedule to this their answer annexed, and which they pray may be taken as part thereof, which books and repertories form a part of the records of the said city of London, which contain entries of divers matters and things which these defendants, the mayor, &c., are advised and believe form most material evidence of their said exclusive right of metage, and which these last-named defendants intend to make use of against the said complainants in the before-mentioned suit in support of their said right: and these defendants admit that they have in their possession a book marked B., containing an entry purporting to be an account of certain dues and charges payable to the Crown in the time of King Henry the Third, in respect of vessels coming to Queenhithe, or in respect of the port or landing of articles and things at Queenhithe; but these defendants say, that the said book marked B. does not form any part of the records of the said city, or of any records in the possession of these defendants, and these defendants have no means of knowing whether the said entry contains a true reference to or representation of the matters or things to which it purports to relate; however, these defendants, the mayor, &c., say that the said book marked B. contains entries of divers matters and things which these last-named defendants are advised and believe form most material evidence of their said exclusive right of metage, and which these last-named defendants intend to make use of against said complainants in the before-mentioned suit. But save as aforesaid. these defendants deny, to the best of their knowledge, information, and belief, that these defendants, or any or either of them, or any other persons or person, by the order or for the use of them, or any or either of them. have, or hath, or had lately, in their or his possession, power, or custody, any documents or document relating to the dues and charges received by the bailiffs," &c. [following the words of the bill. The defendants then admitted

COMBE CORPORATION OF LONDON. Companion of London.

that they had in their custody or power certain written books and repertories, containing statements, or purporting to contain copies and extracts from documents relating to Queenhithe and Billingsgate, and the measuring of corn, &c., which books and repertories, as they alleged, contained, from a very early period of time, the proceedings of the court of aldermen and court of common council, and other matters relating to the city and its privileges; and the defendants stated, that the said books and repertories were referred to or contained in the first schedule to their answer, but the defendants submitted that the plaintiffs were not entitled to inspect them, and that the defendants ought not to be compelled to produce them, for the defendants denied that the plaintiffs had any interest therein, or in any or either of them. "Moreover, these defendants deny, to the best of their knowledge, information, and 4 belief, that if the said books, repertories, documents, evidences, and writings, or any or either of them, were or was produced, it would appear, by them or any or either of them, that the said right of metage commenced within the time of legal memory, or that the right thereto is confined to the said city of London, or the public quays, or wharfs, or markets situated within the said limits, or that the said books, repertories, documents, evidences, and writings contain or would furnish evidence on behalf of the said complainants, and in support of their defence to the said suit commenced by these defendants, the mayor, &c., against the said complainants; on the contrary, these defendants say they are advised and believe, that such books, repertories, documents, evidences, and writings contain entries of divers matters and things, which these defendants are advised and believe are most material evidence in support of the said right of metage."

In answer to the charge of possession of cases and opinions, the defendants admitted, "that they have in their possession, custody, or power divers written cases and

answers thereto, relating to the right of measuring and carrying corn and grain landed from the Thames; and these defendants say they have, in the second schedule to this their answer annexed, and which they pray may be taken as of part thereof, set forth a list or schedule of all such cases and answers thereto. However, these defendants say, that the said cases consist of three sorts: first, cases relating to the right to metage and portage: secondly, cases relating to the right to metage only: thirdly, cases relating to the right of portage only: and these defendants say, that all the said cases were prepared by the solicitor or legal adviser of the corporation of London on their behalf, either after litigation upon the subject of such cases had commenced between the said corporation and parties disputing their rights, or in contemplation of litigation upon the subject-matter of such cases, and with a view to the assertion in such litigation of the rights of the said corporation to metage and portage. And these defendants say, that all such cases set out and contain statements of the evidence of the defendants relating to the subject-matter of such cases respectively to be used in case of litigation ensuing, in respect of the subject-matter of such cases; and such cases, and especially such as relate to metage, set out and contain statements of evidence which these defendants believe to be most material, and which they intend to adduce in support of their right in the suit commenced by these defendants against the said complainants, for an account of what is due to these defendants from the said complainants in respect to the metage of malt which the said complainants have caused to be landed at the said Duchy Wharf, and elsewhere, on the river Thames, within the limits aforesaid, and which right of metage is the same as the said right, respecting which the said cases were prepared and written as aforesaid: and these defendants say, that all such cases as contain answers were submitted to, and contain the opinions amongst other counsel of the law officers

COMBE 9.
CORPORATION OF LONDON.

COMBE v. CORPORATION OF LONDON.

of the corporation of London, who are their sworn legal advisers: and these defendants say, they have distinguished in the said second schedule the said cases, by figures, &c.: and these defendants submit and insist that they ought not, under the circumstances herein mentioned, to be compelled to produce, and that the said complainants are not entitled to inspect any of such cases, or any part or parts thereof respectively, or the opinions or answers given thereon, or any of such opinions or answers: and these defendants say, that such cases were prepared and answered between the years 1799 and 1835: and these defendants deny that all such cases were prepared and answered before the matter in dispute in the said suit was agitated between these defendants and the said complainants."

A motion was now made for the production, by the defendants, the corporation, of the several charters, proclamations, reports, orders, paper writings, or copies of documents, and the several books and repertories mentioned in their and the defendant Henry Woodthorpe's answer in this suit, or in the first schedule thereto, and also the several cases and answers thereto mentioned in the second schedule to the said answer, and for the production by the defendants, Hurcombe and Eayres, of the several accounts, books, and documents mentioned in their answer to this suit, and the schedule thereto.

Some of the documents comprised in the above notice of motion had already been ordered to be produced by Lord *Abinger*, C. B., in the cross suit to the suit for porterage (a).

(a) See 4 Y. & C. 159. It appeared from the schedules to the respective answers in the portage and metage suits that the documents referred to in those schedules respectively were, for the most part, identical. The following is a more precise description, than appears in the report of the case

in the Exchequer, of the documents which the Lord Chief Baron ordered to be produced: viz., the entry in Book A. of an inquisition or inquiry made in the 28th Hen. 3; the paper writings purporting to be copies of the orders of Hen. 3; the entry in the Book G. F. of an inquisition of the Mayor of London Mr. Simpkinson and Mr. James, for the plaintiffs.

Mr. G. Richards and Mr. Randell, for the defendants.

COMBB T. CORPORATION

1842.

Upon the question of the production of the documents of London. generally, the following cases were cited for the plaintiffs:

Bolton v. Corporation of Liverpool (a), City of London v.

Thomson (b), Firkins v. Lowe (c), Newton v. Berresford (d),

Burrell v. Nicholson (e), Smith v. Duke of Beaufort (f), Bannatyne v. Leader (g), Latimer v. Neate (h), Taylor v. Milner (i), Combe v. City of London (j). As to the production of cases and opinions, Nias v. Eastern Railway Company (k),

Greenlaw v. King (l); and with respect to the materiality of the charters to the plaintiffs' case, by reason of the expression "Port of London," occurring in one of them,

Kingston-upon-Hull Dock Company v. Browne (m).

The following authorities were cited for the defendants: Wigram on Discovery, 275, (2nd ed.); Bligh v. Berson (n), Glegg v. Legh (o), Bellwood v. Wetherell (p), Richards v. Jackson (q), Adams v. Fisher (r), Hughes v. Biddulph (s),

in the 41st Edw. 3; the entry or copy in Book A. of the inquisition before Elias Russell, Mayor of London, made in the 29th Edw. 1; the paper writings purporting to be copies of an act of Common Council of the 4th of Edw. 4, and of a proclamation issued or made in the 9th of Eliz., and of the report of certain of the Court of Aldermen, made in the 8th of Eliz.; and the paper writings purporting to contain an account of the dues and charges payable to the Crown in respect of vessels coming to Queenhithe, or in respect of the port or landing at Queenhithe. Liberty was given to the plaintiffs to take copies or extracts.

(a) 3 Sim. 467, see p. 490; 1

M. & K. 88.

- (b) 3 Swan. 265, n.
- (c) M'Clel. 73; 13 Price, 193.
- (d) 1 Younge, 377.
- (e) 1 M. & K. 680.
- (f) 1 Hare, 507.
- (g) 10 Sim. 229.230
- (h) 11 Bligh, 112; 2 Y. & C. 257.
  - (i) 11 Ves. 41.
  - (j) 4 Y. & C. 139.
  - (k) 3 M. & Cr. 355; 2 Keen, 76.
  - (l) 2 Beav. 137.
  - (m) 2 B. & Ad. 43.
  - (n) 7 Price, 205.
  - (o) 4 Mad. 193.
  - (p) 1 Y. & C. 211.
  - (q) 18 Ves. 474.
  - (r) 3 Myl. & C. 526.
  - (s) 4 Russ. 190.

COMBB COMBB CORPOBATION OF LONDON. June 94k. Walker v. Wildman (a); and with respect to the cases and opinions, Knight v. Marquess of Waterford (b).

Sur 290.

THE VICE-CHANCELLOR.—In this case the defendants have conceded (without prejudice to their right of resistance to any other part of the motion) the production of such of the documents admitted to be in their possession or power, as the Lord Chief Baron directed to be produced in the cause before him. The documents which they did not concede, and as to which I reserved my decision, were, first, certain cases and opinions; secondly, certain charters of King James the First and King Charles the First; thirdly, the corn-meters' books; and fourthly, certain other books and repertories. As to the first class, the cases were prepared, and the opinions taken under circumstances, which are thus stated by the defendants—[His Honor here read the passage within inverted commas, commencing, ante, p. 646].

The circumstances thus stated are, I think, sufficient to protect these documents; it not being, in my judgment, material to the question, that the litigations to which some of them at least related were litigations with other parties than the plaintiffs in the present cross bill. As to metage, the alleged right in dispute was the same; and as to portage, neither is that alleged right destitute of all connection with the other, nor is it at this moment otherwise than in litigation between the actual parties on this record. I conceive, that, according to principle, I ought not to make any order as to these documents, and that there is not any authority which compels me to do so.

With regard to the three other classes, my opinion is different. To protect a defendant from the discovery or production of a document, relating to the subject of dispute, it is not sufficient that it should be evidence of his

title, or contain evidence that he intends and is entitled to use in support of his case. It may also be of a similar character with regard to the plaintiff's case, either in a directly affirmative manner, or by exhibiting matter at variance with the defence, or tending to impeach it. I do not at present refer to the instances in which a document forms the common title, or is a subject of the mutual and common right of the plaintiff and defendant. If it be with distinctness and positiveness stated in an answer, that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case; that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title, or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected, if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness. Believing these tests to be founded in principle and warranted by authority, I have tried by them the three classes of documents which I am now considering, and the result is as I have stated.

With regard to the charters, without laying any stress on an expression which was the subject of some remark during the argument (that of "the port of the City of London"), I conceive that each of them is shewn to contain matter which may be rationally contended to support the case of the plaintiffs, and impeach or weaken that of the defendants. I do not express or intimate any opinion whether that will or ought to be the result. It is sufficient for

COMBE TO LONDON.

COMBE 9. CORPORATION OF LONDOŃ. me to see that, according to my judgment, the matter is such as the plaintiffs' legal advisers may by a reasonable possibility fairly so use. The defendants put their case upon prescription, claiming by a title superior to the charters and to which neither of the charters was necessary.

With regard to the metage books, and the other books and repertories, their protection appears to me to fail in the other part of the test which I have stated.

I do not doubt that they contain some matter which is evidence, and neither more nor less than evidence in support of the defendants' case. But is there no other relevant matter which they contain? This is a question which, in my opinion, is not answered, or not satisfactorily answered by the defendants. The documents are numerous, and probably voluminous; and it appears to me consistent with every answer on the record, that the examination to which they have been subjected may have been lax and defective. I cannot find a positive statement any where, that their whole contents are merely and exclusively matter of evidence in support of the defendants' case, or irrelevant to that of the plaintiffs'; nor can I discover an averment that any person, who has examined those documents, has positively stated, or can positively state, that their whole contents are so.

In the answer of Hurcombe and Eayres there is this statement. [The Vice-Chancellor here read the passages within inverted commas, commencing, ante, p. 639, and observed, that it was remarkable that, in a question of so much importance as that of the variance of the fees and wages for metage, the defendants, the corn-meters, should state that the books might contain other matters than those which they had mentioned, and yet, in the same sentence, deny, but only according to the "best of their knowledge, information, and belief," that there had been any variance. And his Honor, from this and other similar passages in the same answer, drew the inference, that the

examination of the books had not been precise and complete. He then read the passages within inverted commas in the answer of the Corporation and Woodthorpe, commencing, ante, p. 640, and concluding at p. 646, at the same time commenting upon the absence of the junction of Woodthorpe in some of the most important allegations: and the want of precision, compared with the positive statements in other matters, with which it was denied that the books contained entries shewing the variance in the fees and wages for metages. With respect to the claim made by the defendants for the protection of their charters and repertories, he referred to the observations, made at the beginning of the judgment, upon the general principles on which, in his opinion, the right to protection rested. He then said: - If there are any passages materially more favourable to the defendants on the present motion than these, I am not aware of them. That these are sufficient for the purpose of protection, I cannot agree. The charters, books, and repertories must therefore, in my opinion, be produced, but not until after the 23rd inst., in the same manner as the first-mentioned documents; with liberty to conceal on affidavit such parts as do not relate to any matter in question in the cause. say after the 23rd instant, in order to afford the defendants the opportunity of applying to the Lord Chancellor by appeal from my present decision; an application which I wish to be understood as neither encouraging nor discouraging.

COMBE 5.
CORPORATION OF LONDON.

1842.

June 3rd.

WILSON v. SQUIRE.

THOMAS HILL, by his will, gave and bequeathed unto

his executors therein named, certain stocks, funds, and se-

curities, upon trust, that they should assign and transfer

the sum of 1000l., Three per cent. Consols, part of the

said stocks, funds, and securities, unto the governors and

trustees of the London Orphan Society in the City Road,

or unto such other person or persons as should be entitled

under or by virtue of the rules and regulations established

Testator bequeathed a legacy to "The London Orphan Society in the City Road." There was no institution precisely answering this description: but there was a "London Orphan Asylum" at Clapton, and an "Orphan
Working
School" in the City Road :-Held, that the former institution was not, and that the latter was, within the description contained in the will.

Parol evidence to explain a will rejected. for the government of the said society to receive the same, to and for the benefit of the said society. A reference having been directed to the Master to inquire what charities were entitled to the legacies given by the will to charities, and who were the proper parties, by their respective rules, entitled to receive their respective legacies, the Master, in relation to the above-mentioned bequest, found that there was not any society or institution answering precisely to the description in the will; that there was an institution commonly called the Orphan Working School in the City Road, but that there was no evidence before him to shew that the testator was a subscriber to, or in any way connected with, the institution called the Orphan Working School; and that the testator was, during many years, a subscriber to the London Orphan Asylum, which is situate at Clapton, in the county of Middlesex, and in his lifetime avowed his intention of leaving a legacy thereto. And he found that the London Orphan Asylum was the society intended by the

4. che. 296.

Both the London Orphan Asylum and the Orphan Working School having preferred their claims before the Master, he, in support of the state of facts brought in

testator, and that Alderman Thompson, the treasurer, was the person who, by the rules of the charity, was entitled to

receive the legacy.

by each 'party respectively, allowed certain affidavits to be read for the purpose of shewing the testator's circumstances and explaining his intentions.

WILSON U. SQUIRE.

The affidavits in support of the London Orphan Asylum were, in substance, comprised in the Master's report. From the affidavits on the other side it appeared that the testator, some years since, lived at Camden Town; that he frequently passed by the Orphan Working School in his way to the City; that, in 1829, he gave instructions for a will, in which instructions, as taken down by the attorney, was a bequest to the "London Orphan Society, City Road," and that upon being afterwards asked, whether the situation was rightly described, he answered in the affirmative, observing, at the same time, that it was not far from where the attorney lived, which was at that time at Pentonville.

Exceptions to the Master's report were taken by the treasurer of the Orphan Working School, both on the ground of the evidence admitted by the Master, and of the general result of the Master's finding.

Mr. Rolt, for the exceptions.

Mr. Stinton, for the report.

The following cases were cited: Doe d. Hiscocks v. Hiscocks (a), Doe d. Westlake v. Westlake (b), Abbott v. Massie (c), Price v. Page (d), Millar v. Travers (e), Langham v. Sandford (f).

THE VICE-CHANCELLOR.—In this case the first subject of inquiry is, whether there is a body of men, or an institution, capable of answering the description given by the testator. He has given a legacy to the governors of the

<sup>(</sup>a) 5 Mee. & W. 363.

<sup>(</sup>e) 1 Moore & Scott, 342; 8

<sup>(</sup>b) 4 Barn. & Ald. 57.

Bing. 244.

<sup>(</sup>c) 3 Ves. 148.

<sup>(</sup>f) 19 Ves. 643, 649.

<sup>(</sup>d) 4 Ves. 680.

WILSON 5.

London Orphan Society, in the City Road. It is clear, therefore, that it is a legitimate subject of inquiry by extrinsic evidence, whether there be a London Orphan Society in the City Road. It appears that there is in the City Road a charitable institution, conducted by a voluntary association of persons, for the purpose of educating and bringing up orphans, and apprenticing them, or fitting them for situations of labour. It is a charitable institution for the benefit of orphans, certainly in a particular way, but in a reasonable and not extraordinary way. No man can say, that a society so constituted is not an orphan society.

It then remains to deal with the word "London." The word may be used in two senses; the one strict and topographical, the other popular and general, as meaning the metropolis and the suburbs immediately adjacent. The testator cannot have meant to use the word London in the former sense; because he, at the same time, mentions the City Road, which is admitted to be not in the city of London. The word is used by him as equivalent to metropolis. He here, therefore, gives to an orphan society, in or near the metropolis, that is to say, in the City Road; and I find in the City Road a charitable society and institution for the benefit of orphans, in the manner already mentioned. He therefore accurately and truly describes the society represented by Mr. Rolt.

It has, however, been made a question, whether there is not an ambiguity in the will raised by extrinsic evidence? If it were so, it might follow that evidence might be introduced to shew what institution was intended. It is contended that there is another body of persons to which the words of the will are applicable, and the evidence which is said to support this argument is evidence shewing that there is another society, called the London Orphan Asylum, at Clapton; Clapton being in or near Hackney: the City Road, on the contrary, where the other society is,

being in St. Luke's, Old Street. Is it possible to say, that the description which the testator uses is equally applicable to both? I apprehend, that the society represented by Mr. Stinton is not described in the will, and that in order to satisfy the will the only question is, whether there is an Orphan Society in the City Road. I find that there is such a society, and that there is no other charity which can properly be described by the same terms. The parol evidence, therefore, has no place.

1842. WILSON SQUIRE.

settled in trust

for afterborn illegitimate children. Upon

If, however, the parol evidence were admitted, I am not sure that I should not have arrived at the conclusion to which I have come without it.

THE 6th Exception (i. e. to the general result of the Master's Report) allowed; the other exceptions neither allowed nor disallowed.

## WILKINSON v. WILKINSON.

THE plaintiff had made a settlement of personalty upon Personal estate Harriet and Mary, his daughters by Laura Wilkinson, and all other the children he might thereafter have by her: and in case they should all die under twenty-five, in trust for the settlor, his executors, administrators, and assigns.

the bill of the settlor, the fund was transferred to him, as Harriet against such children.

The plaintiff and Laura were never married. and Mary died under twenty-five, but there were other children born after the execution of the settlement, who claimed the fund.

Mr. Baily, for the plaintiff.

Mr. Dixon, for the defendants.

THE VICE-CHANCELLOR decreed, that the fund should be transferred to the plaintiff.

1842.

June 3rd, 4th.

Property was put up for sale

by auction, described as " a

leasehold

by a mesne lease of certain

years wanting

assigned apart from the rever-

sion for the remainder of the

term by an in-

conditions of sale, no title

prior to the assignment or

ground or mesne land-

lord was to be produced.

1817, it ap-

originally de-

at a rent of 10/... subject to the

covenants, conditions, and

agreements in

mise contained:

mised, with other property,

the title of anv

From a recital in the deed of

## TAYLOR V. MARTINDALE.

IN this case certain ground rents, and copyhold and leasehold property were, by order of the Court, put up for sale by action in lots, of which lot 2 was thus described: ground-rent of 231., reserved "Lot 2.—A leasehold ground rent of 23l. 12s. 6d. per annum, arising from premises in Upper Thornhaugh Mews, Tottenham Court Road, comprising a coach-house and premises for 98 This rent is reserved by a mesne lease, dated seven days, and 1812, of a piece of ground in Upper Thornhaugh Mews, behind a street then called Upper Thornhaugh Street, now called Sussex Street, with the buildings thereon. for denture of 1817." By the ninety-eight years, wanting seven days, from the 25th March, 1811, and assigned apart from the reversion for the remainder of the term, by an indenture dated in 1817."

The second condition of sale was as follows:--" The respective purchasers shall, within twenty-one days after the delivery of the abstracts of title, give to the vendors, or their solicitors, a statement in writing of the objections, if any, to such titles, and every objection not taken and so peared that the property out of which the rent communicated within such period shall be deemed waived; issued had been and in this respect, time shall be considered the essence of the contract, and such abstracts of the title will, as to the copyhold and leasehold parts of the property, respectively commence as follows: namely, as to the copyholds sold in or before the year 1819, by the trustees for the original de- sale under an act of Parliament passed in the 45th year of

-Held, that, under such circumstances, a good title was not made to the rent of 231., inasmuch as it appeared upon the face of the deed of 1817, that, upon failure of payment of the 10% rent, the rent of 231. might be liable to diminution or forfeiture.

Where conditions of sale are so obscurely worded, that, when taken in connection with the particulars of sale, they are likely to mislead an ordinary purchaser as to the nature of the property offered for sale:—Semble, that the Court will discharge the purchaser from his bargain, on the argument of exceptions to the title, without putting him to the necessity of moving to be discharged from the purchase.

Quere, whether the assignment of rent by a reversioner in a lease does or does not carry with it the reversion?

Geo. 8, c. 112, intituled, &c.," with the printed copy of such act; and as to the leaseholds, with the leases for the same respectively for the terms therein now offered for sale; and as to the rent for years, (lot 2), with the assignment thereof in the year 1817; and no purchaser shall be entitled to investigate, or object to, or require the vendors to shew any prior title to the said copyhold and leasehold premises, or any of them, or any part thereof, nor to require any other proof of the existing leases than the counterparts in the hands of the vendors, nor to require the production of the title of any ground or mesne land-lord."

TAYLOR
v.
MARTINDALE.

At the sale, D. R. Jones became the purchaser of lot 2, at the price of 8801. He afterwards, in due time, sent in an objection to the title to the following effect:-That the leasehold tenements demised by the underlease of 27th Nov., 1812, and out of which the rent of 281. 12s. 6d., forming lot 2, is payable, are liable, with other leasehold tenements, to a ground rent of 101., reserved to Sir William Paxton, the original lessor, by the original lease of the 18th October, 1811, and to covenants relating not only to the tenements underleased, but the other leasehold tenements: and that by the non-payment of the original rent of 101., by the persons who ought to pay it, or by the omission of the persons entitled to any of the tenements demised by the original lease, whether comprised or not in the underlease, to perform any of the covenants of the original lease, the rent in Lot 2 might suffer diminution. or be altogether destroyed: (2 Mer. 424).

To this objection it was answered, that it appeared from the particulars of sale, that the rent was reserved by a mesne lease, and the vendors had stipulated that the purchaser was not to object to any prior title of the leasehold property: that it also appeared from the particulars, that the premises were liable to forfeiture in respect of the original lease, and, therefore, that the purchaser was preTAYLOR

MARTINDALE.

cluded from taking the present objection, which amounted to no more than that there was such liablity.

The purchaser still declining to complete the purchase, a motion was made by the vendors for payment of the purchase-money into Court. On the hearing of that motion, the usual order of reference was made as to title. The Master having reported against the title, the vendors took an exception to his report.

Mr. Simpson and Mr. Tripp, for the exception.—First, the interest which was purchased was not such as to give the purchaser a right to suppose that he would be free from the effect of forfeiture by those over whom he had no control. There is no privity between the purchaser and the lessee. The rent is severed from the reversion—it is a mere rent seck, and is so described in the particulars of sale. Litt. ss. 228, 229. [The Vice-Chancellor.—It may be a question whether, in order to give full effect to the grant, it might not be held to pass the reversion as well as the rent. In Walker v. Shore (a), which was a devise of "all my copyhold ground rent," it was held, that the reversion passed.]

Secondly, the purchaser had, upon the particulars and conditions of sale, sufficient information to put him on inquiry as to the alleged difficulty. There might, it is true, have been an express statement, that the original lease contained other property than that demised by the mesne lease, and that the whole was liable to a rent of 10l. But the mere statement, that there is an original and a mesne lease, implies the possible existence of circumstances of this description. In cases of this nature, the Court will only relieve the purchaser on the ground of fraudulent suppression or misdescription. If the vendor guards himself, as here, by conditions of sale, the purchaser will be bound, though the title be proved bad,

aliunde. Here the vendors are not bound by any thing prior to the deed of 1817. Pope v. Garland (a), Walter v. Maunde (b), Hall v. Smith (c), Daniels v. Davison (d), Allen v. Anthony (e), Spratt v. Jeffery (f), Cattel v. Corrall (g), Shepherd v. Keatley (h). [The Vice-Chancellor.-In Stewart v. Alliston (i), the Court refused to assist the vendor, on the ground of gross inaccuracy of description. Can it be said. in the present case, that the particulars of sale were clear to an ordinary purchaser?] The question here is one of conveyance, and not of title, and the vendors may obtain a release.

1842. TAYLOR Martindale.

Thirdly, the objection cannot be taken by way of exception, but should have been brought forward on motion by the purchaser, to be discharged from his purchase, in which case he must have shewn by affidavit that he had been deceived. Adams v. Lambert (j).

Mr. Russell and Mr. Tatham, contrà, were stopped by the Court.

THE VICE-CHANCELLOR.—The case has been well argued; but it appears to me, that even upon exceptions, if the title is doubtful, the purchaser ought not to be held to his bargain. The subject-matter of the contract is thus described. [His Honor here read the description of lot 2, as before stated.] The description does not contain any intimation of a liability to which the property is subject, which would entitle the underlessee to make a deduction from the rent of 281. 12s. 6d. a year; and as what has been done has been done under legal advice, there is no great probability that this is the result of accident. The condition of sale, con-

<sup>(</sup>a) 4 Y. & C. 394.

<sup>(</sup>b) 1 J. & W. 181.

<sup>(</sup>c) 14 Ves. 426.

<sup>(</sup>d) 16 Ves. 249.

<sup>(</sup>e) 1 Mer. 282.

<sup>(</sup>f) 10 B. & C. 249.

<sup>(</sup>g) 3 Y. & C. 413.

<sup>(</sup>h) 4 Tyr. 571; 1 C. M. & R. 117.

<sup>(</sup>i) 1 Mer. 26.

<sup>(</sup>j) 2 Jurist, 1078.

TAYLOR 9. MARTINDALE.

struing it, as the vendor desires it to be construed, in reference to this rent, is in substance thus:—"The title to commence with the assignment, and the purchaser not to be entitled to investigate, or to require the vendor to shew any prior title to the copyhold or leasehold premises,"—(it may be a question whether the words "copyhold" and "leasehold premises" apply to this ground-rent: upon that, I give no opinion),—"or to require any other proof of the existing leases than the counterparts in the hands of the vendors, nor to require the production of the title of any ground or mesne landlord." Now, the title, as produced, commences with the deed of 1812. The deed of 1817 is the second instrument in the abstract.

That deed recites the whole title. It recites a lease from Sir W. Paxton to Hopkins of various parcels of ground, which are admitted to exceed in extent the quantity of ground which is the subject of underlease, and they are demised at a rent of 101., subject to the covenants, conditions, and agreements therein contained. It may be assumed, therefore, that besides the covenants and agreements it is subject to certain conditions; and that a condition means something upon breach of which the interest may be avoided—may be determined before the appointed period. This interest Hopkins assigns to Moran; and Moran underleases a part only of the property which he had acquired to Shepherd, for a term short of the original term, reserving a rent of 23L and a fraction; and Moran having a rent thus reserved to himself, under an underlease of part of the premises, assigns it to Howe, and Howe assigns it to the person under whom the vendors claim.

In this state of things it is, that the title is sought to be enforced under the contract which I have mentioned, there being nothing whatever to prevent Paxton, or those who represent him, from enforcing payment of the 10l., under the original lease, against the person who claims

under this under-lease and pays the 231. If he does pay it, he would, I apprehend, be entitled to deduct it from the 231., and as this is not an incumbrance from which the purchaser can be freed by the vendors, it is an objection of title, not of conveyance; it is an objection arising within and upon the face of the deed of 1817, and in the strict construction of the second condition, rendering it as the vendors wish, it is an objection from which the purchaser is not precluded. If, however, I doubted more than I do upon this part of the case, which is independent of the question as to the right of re-entry, I should say, that the condition itself is so obscurely worded, and, in connection with the particulars of sale, is so far from giving a clear and accurate description of the property, (that is to say, in the apprehension of ordinary persons), that upon that ground alone, and even upon exceptions, I should have been very unwilling to support the title, or to hold the purchaser to his bargain.

TAYLOR
v.
MARTINDALE.

Exception overruled, but without costs, except to the extent of the deposit (a).

(a) See, as connected with the Fonbl. Treat. Eq.., Vol. i. p. 156; first point argued in this case, Terrers v. Noby, Nels. 124.

1842.

June 23rd.

By a post-nuptial marriage

settlement, property in the

funds, belong-

trust for the husband and

wife for their lives and the

life of the sur-

more exclusively of the

vivor, and then for such one or

others or other of the children

of the marriage,

or will appoint.

There were four children of the

husband died,

and the wife appointed the

assigned her life interest

therein to the eldest child, a

daughter, who had attained

who, together

with the other children, was

living with her mother :-

Held, that the

appointment

a trustee re-

fusing to join in the transfer

the age of

in such parts and shares &c.

as the wife should by deed

ing to the wife, was settled in

## CAMPBELL v. Home.

BY a post-nuptial indenture of settlement, dated the 22nd July, 1834, and made between Sir James Campbell of the one part, and the Marquis of Sligo and John Home Home of the other part, after reciting that by an indenture of settlement made previous to the marriage of Sir James Campbell and Lady Dorothea Louisa Campbell, his wife, two several sums of 11,5611.6s.6d., Four per cent. Consols, and 10,000l. Irish currency, were settled upon trust to pay out of the interest thereof 3001. a year, Irish currency, pin-money, to Lady Dorothea Louisa Campbell, which income not having been paid accordingly was calculated to amount, from the period of such marriage up to the 29th September, 1833, to the sum of 4430l. 13s. 4d.; and after reciting that Sir James Campbell had received and applied to his own use two sums of 4615l. 7s. 8d., and 450l., which had been bequeathed by the persons therein named, to marriage. The Lady Dorothea Louisa Campbell, which said two sums amounted, together with the said first-named so calculated whole fund, and sum as aforesaid, to the aggregate principal sum of 94961. 1s. sterling; and, after reciting that, in consideration of the premises, and of the natural love and affection which Sir James Campbell bore to his said wife and their three children, and in order to secure a further provision for his twenty-one, but said wife and children, (other and considerable provision having been made by the original settlement), he, the said Sir James Campbell, had invested the sum of 10,000%. sterling in the purchase of 11,019l. 5s. 8d., 3l. per cent. and assignment Consolidated Bank Annuities, in the names of the Marquis were valid, and of Sligo and John Home Home, as they did thereby admit and acknowledge, to be held upon and for the trusts there-

of the fund, pursuant to the appointment, was not allowed his costs of a suit brought against him by the daughter to compel the transfer, though, under all the circumstances of the case, he was not decreed to pay the costs of the suit.

inafter declared: it was witnessed, that for the considerations thereinbefore mentioned, &c., and Sir James Campbell did thereby declare that the Marquis of Sligo and said John Home Home, their executors, &c., should stand and be possessed of and interested in the said sum of 11,019%. 5s. 8d., Three per cent. Consolidated Bank Annuities, (with power to vary the securities as therein mentioned), and should, from time to time, pay the dividends, interest, and annual produce of said trust monies, stocks, funds, and securities to Sir James Campbell and his assigns during his life, and after his decease, to Lady Dorothea Louisa Campbell, for her life, and after the decease of the survivor, should stand and be possessed of and interested in all and singular the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, in trust for all and every, or such one or more, exclusively of the others or other, of the children or child of the said Sir James Campbell, by said Lady Dorothea Louisa Campbell, then living, or thereafter to be born, with such provisions for their respective maintenance, education, and advancement, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such parts, shares, and proportions, and with such annual sums of money, and limitations over, for the benefit of the said children, or some or one of them, and upon such conditions, with such restrictions, and in such manner as the said Lady Dorothea Louisa Campbell should, notwithstanding her coverture, by any deed or deeds, instrument, or instruments in writing, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament, &c. from time to time direct or appoint, and in default of any such direction and appointment, in trust for all and every the children and child then living, or thereafter to be born,

CAMPBELL 9. Home. CAMPBELL 6. Home. of the said Sir James Campbell and Lady Dorothea Louisa Campbell.

Sir James Campbell died in May, 1835, leaving his wife Lady Dorothea Louisa Campbell, and four children by her, surviving him; namely, Elizabeth Ann Louisa, Charlotte, Emily, and James.

The sum of 11,019*l*. 5*s*. 8*d*. consols, mentioned in the settlement, was invested in the joint names of the Marquis of Sligo and John Home Home, at the time of the execution of the indenture of 22nd July, 1834, and it had remained so invested upon the trusts of that indenture ever since.

Elizabeth Ann Louisa, the eldest daughter of Sir James and Lady Dorothea Campbell, attained the age of twenty-one years on the 24th January 1840.

By an indenture dated the 20th March 1840, and made between Lady Dorothea Louisa Campbell of the one part, and Elizabeth Ann Louisa Campbell of the other part, reciting the settlement of the 24th July, 1834, the death of Sir James Campbell leaving such children as before-mentioned, and that Elizabeth Ann Louisa had attained the age of 21 years, and that Lady Dorothea Louisa Campbell was desirous of making an immediate independent provision for Elizabeth Ann Louisa Campbell, &c., it was witnessed that Lady Dorothea Louisa Campbell, in consideration of natural love and affection, and in exercise of the power reserved to her by the settlement, appointed the whole of said sum of 11,0191. 5s. 8d. stock to the said Elizabeth Ann Louisa Campbell, her executors, administrators, and assigns, to and for her and their own exclusive use and benefit. And, for the considerations aforesaid, it was further witnessed that the said Lady Dorothea Louisa Campbell thereby absolutely assigned, transferred, set over, remised, and released, to the said Ann Louisa Campbell, her executors, &c., the life interest of her the said Lady

Dorothea Louisa Campbell, of and in the dividends, interest, and annual produce arising from said settled fund, to the end, intent, and purpose, that the whole of said 11,019l. 5s. 8d., Three per cent. Consols, and the dividends, interest, and annual produce thereof, might thenceforth become and be the sole, absolute, exclusive property of the said Elizabeth Ann Louisa Campbell, her executors, administrators, and assigns.

This deed was duly executed in conformity with the requisites of the power contained in the settlement.

One of the trustees, John Home Home, having refused to join in the transfer of the 11,019l. 5s. 8d. stock to Elizabeth Ann Louisa Campbell, as appointee under the last-mentioned indenture, the present bill was filed by her, and the Marquis of Sligo, against Home and Lady Dorothea, to obtain a declaration that the plaintiff was entitled to the stock, and for a transfer thereof accordingly.

The defendant Home, by his answer, stated that he had been appointed one of the executors of the testator, and he believed that Lady Dorothea had possessed herself of part of the testator's assets, of which he and his co-executors had not been able to obtain a satisfactory account. That a suit of "Campbell v. Campbell" had been instituted by the Rev. A. M. Campbell, as the next friend of the infants, for the administration of the testator's estate; and that afterwards a suit of "Campbell v. Mackay" had been instituted by Lady Dorothea herself for the same purpose, and also for the purpose of carrying into execution the settlement made previously to her marriage, and the settlement of July 1834. (See 2 Myl. & C. 25). That the fund now in question formed part of the subject of the suit of "Campbell v. Mackay," and although the proceedings in that suit had been stayed by the order of the court for the benefit of the infants, yet it was competent to Lady Dorothea and the plaintiff, who had attained her majority, to prosecute that suit if they pleased, though not as an infants' CAMPBELL 0. HOME. CAMPBELL v.

suit. That an order had been made, in "Campbell v. Campbell," directing Lady Dorothea, who was guardian of the infants, to bring them within the jurisdiction, but that she had refused to comply with it. That it might be necessary to retain the life interest of Lady Dorothea in the fund, either to compel her to obey the orders of the court or to replace the assets for which she had not ac-That the defendant believed that Lady Dorothea had incurred debts which she had no means of discharging. That he, the defendant, was not satisfied that the appointment, even if duly executed, was made by Lady Dorothea, bond fide, for the benefit of the plaintiff, more especially as the plaintiff was, as he believed, under the influence or control of her mother, and deprived de facto of the protection of this Court; that there was no reasonable cause assigned for the transfer of so large a fund to the plaintiff; and that there was reason to apprehend that the transfer was made as a means of enabling Lady Dorothea to obtain funds wherewith to pay the debts which she had probably incurred: under these circumstances the defendant stated that he should not, as he considered, be doing his duty to the other children, who were still infants, if he parted with this fund without the sanction of the Court.

It was admitted that the plaintiff was living with her mother, and it was not suggested that any marriage was in contemplation.

Mr. Simpkinson and Mr. Parry, for the plaintiff.

Mr. Cooper and Mr. Fisher, for the defendant Lady Dorothea.

Mr. Russell and Mr. Craig, for the defendant Home, contended that it was clear from the language of the settlement, taken altogether, that it was not intended that the appointment should take place till after the death of

the survivor of the parents. [The Vice-Chancellor.—M'Queen v. Farquhar (a), exhausts the whole subject.] They relied on the facts stated by the answer as a justification of the defendant's refusal to transfer the fund. They referred to Lord Hinchinbroke v. Seymour (b). [The Vice-Chancellor.—Here the plaintiff has attained twentyone.]

1842. CAMPBELL 9. HOMB.

THE VICE-CHANCELLOR.—If I were to refuse to give effect to the appointment in this case, or to the assignment, it would be to decide, or very nearly to decide, that in no case where a party assigns a life-interest to an adult child, an exclusive power of appointment should be exercised.

The settlement is proved containing the exclusive power of appointment; the number of children is proved; the age of the eldest child and the appointment. The appointment is made by a person, of whose character there is no impeachment; and it is further sustained by the junction with the appointee, in the suit for the purpose of enforcing the appointment, of a person of honour and character who is one of the trustees of the fund. I cannot, therefore, hesitate as to giving effect to it.

It is quite true that this, as well as every other transaction, may be affected by some possible fraud or mistake, or misconduct; but where is the fraud, or the mistake, or the misconduct here? It is barely hinted at in the answer. It is not alleged, or if alleged, not proved; and there seems to be no reason to believe it. What may be the intention of this lady in regard to the disposition of the money, is not a question with which the Court has to deal. If it can ever be shewn that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside. There is nothing whatever to justify this Court in not giving effect to it at present.

1842. Campbell v. Home. With regard to the history into which the defendant has entered of former suits and former disputes, and the real or supposed misconduct on the part of the mother of the plaintiff, I have nothing whatever to do with it. The question now before the Court is a mere question of right.

Considering the line of defence taken by the answer, and the quantity of irrelevant matter into which the defendant has travelled; and considering also the absence of any ground for the objection which has been brought forward against this appointment, it is impossible for me to give Colonel Home his costs. I do not, however, think it necessary to fix him with costs.

## PITT v. BONNER.

June 9th. Where a decree has been had against several defendants, with costs, and one of them has been compelled to pay the whole costs, the Court will by consent decree contribution between the codefendants, on motion in the same suit.

THE plaintiff filed his bill to recover the arrears of an annuity which had been granted by certain persons on the security of their shares in a colliery. Hill was a subsequent mortgagee of those shares, and was made a defendant. The other defendants were the executors and assignees of the original holders, all of whom had died or become bankrupt; the assignees of some of them being brought before the Court by supplemental bill (a).

The plaintiff having obtained a decree for an account and payment of the arrears of his annuity, with costs, against all the defendants, proceeded against and recovered from Hill the whole amount of the costs, amounting to 8471. 15s. Hill then applied to the other defendants for contribution, in equal shares, but could obtain no payment; those assignees who were brought before the Court by supplemental bill contending that they were not called

<sup>(</sup>a) The facts of this case are shortly noticed in Bowser v. Colby, 1 Hare, 109.

upon to pay more than a share of the costs of the supplemental suit.

PITT v.
BONNER.

A motion was now made, on behalf of Hill, for a reference to the Master to enquire what were the respective proportions of the costs which ought to be paid to Hill by the co-defendants.

Mr. Cooper and Mr. Heathfield, for the motion, said, that although it had been considered as a general rule that where a decree is had against several defendants with costs, and one is compelled to pay the whole costs, his remedy against the other defendants for contribution is by action or bill, yet it could hardly be doubted that in a plain case like the present the Court would give a remedy, by motion in the suit in which payment of the costs was decreed. They admitted, however, that they could produce no other authority on the subject than Jones v. Cawthorne (a).

Mr. Bellamy and Mr. Elmsley, for the defendants, did not oppose the motion.

The VICE-CHANCELLOR said that he had no difficulty, under the circumstances, in making the order of reference. The course proposed was a desirable one, and might save much trouble and expense. As the plaintiff, however, had no interest in the question, it should appear in the order that it was made between defendants only.

(a) 2 Fowl. Exc. Pr. 300.

1842.

June 27th. July 5th. Injunction to stay proceedings in the Court of Bankruptcy, under stat. 1 & 2 Vict. c. 110, after decree in this Court for an account against the party taking those proceedings, refused under

special circum-

stances.

1. Coll. 234.

## PERRY v. WALKER.

IN August, 1836, the plaintiff filed his original bill against the defendant, stating various dealings and transactions between them in respect of work and labour done by the plaintiff, as bricklayer and builder for the defendant, on the one hand, and money lent by the defendant, who was a solicitor, to the plaintiff on the other hand; and praying that an account might be taken between them, and that, upon payment of the balance, certain leasehold premises which had been mortgaged by the plaintiff to the defendant, might be re-assigned, &c.

The cause came on for hearing on the 16th March, 1842, before Knight Bruce, V. C., when his Honor decreed that the accounts prayed by the bill should be taken, with various enquiries and directions as to the delivery and payment of certain bills of costs alleged to have been delivered by the defendant to the plaintiff, with liberty to state special circumstances as to the propriety of any charges therein contained, and a direction to state the course of dealing between the parties relative to interest, &c.

The decree having been passed and entered, the defendant, in June, 1842, filed an affidavit of debt against the plaintiff in the Court of Bankruptcy, pursuant to the statute 1 & 2 Vict. c. 110, sect. 8; and, immediately afterwards, served the plaintiff with notice. The plaintiff then filed his supplemental bill against the defendant, praying for an injunction to stay the proceedings in bankruptcy.

The plaintiff now moved for an injunction, stating, by his affidavit, that the whole of the dealings and transactions in respect of which the affidavit was filed in the Court of Bankruptcy, were the subject of the suit in this Court, and that he was not indebted to the defendant on any other

account; and also, that he believed that the object of the defendant in proceeding as he had done, was to procure himself to be named the assignee of the plaintiff, and so to obtain control over the suit in this Court, and prevent the accounts from being properly taken. This latter statement, as to the object of the defendant, was of course denied by him.

PERRY v. WALKER.

Mr. Russell and Mr. Glasse, for the motion, cited Atwood v. Banks (a), Storer v. Jackson (b), Smith v. Cleasby (c), and Beckford v. Kemble (d).

Mr. Cooper and Mr. Wright, contrà.—First, it may be doubted whether this Court has jurisdiction to interfere; but, at all events, the Court of Bankruptcy has the preferable jurisdiction. The principles laid down in Atwood v. Banks are new. It will perhaps be contended that the Court of Bankruptcy cannot interfere till a fiat has issued. But all courts have perfect controul over their own records; and the plaintiff might have made an application to the Court of Review to take the affidavit off the file, on the ground of the parties availing themselves of the act in a fraudulent way. That such a right exists in bankruptcy may be inferred from the language of Lord Eldon in Exparte Lanchester (e), where he speaks of the general right

(a) 2 Beav. 192.

(b) Cor. V. C. E., Nov. 1841. The case, as stated at the bar, was this: Storer was in partnership with three individuals. They had an account with the Joint-Stock Banking Company at Hull, and a large debt was due from them to the Company. Storer having disputes with his partners, filed a bill against them for an account. The other partners, who were influential shareholders in the banking

company, induced the company to file an affidavit of debt, and to give notice to Storer of their intention to make him a bankrupt under 1 & 2 Vict. c. 110. The same solicitor acted for the company and for Storer's firm. The Vice-Chancellor of England granted an injunction to restrain the proceedings in bankruptcy.

- (c) Cor. V. C. E.
- (d) 1 Sim. & St. 7.
- (e) 17 Ves. 513.

PERRY v. WALKER.

to take out a commission of bankruptcy, where "there is no preventive remedy." Other cases lead to the same conclusion: Ex parte Gallimore (a), Ex parte Harcourt (b), Ex parte Brittain (c).

Secondly, if this Court has jurisdiction, or should think proper to interfere, it will not look into the motives of the creditor in taking the present step; and here there is no ground to suppose the existence of any but legitimate motives: Ex parte Wilbeam (d), Ex parte Parkes (e), Ex parte Bourne (f), Ex parte Smith (g), Ex parte Christie (h), Ex parte Kemp (i).

In the course of the argument the *Vice-Chancellor* asked the plaintiff's counsel whether they would admit that at the time of filing the affidavit, he was a trader within the meaning of the bankrupt laws? This they declined to do.

July 5th.

The Vice-Chancellor.—The decisions of the Master of the Rolls and the Vice-Chancellor of England, are decisions on a subject of great difficulty. They are very important, and worthy of much consideration; but it is not necessary for me, in this case, to express, nor do I wish to be understood as expressing any assent to or dissent from them. There is no equity in support of this motion, except that, as between the parties, there has been a decree for a general account; the plaintiff grounds his application on the supposed analogy between an action which might be the subject of an injunction in such a case, and a fiat in bankruptcy. I apprehend that, although a decree may

<sup>(</sup>a) 2 Rose, 234.

<sup>(</sup>b) Id. 203.

<sup>(</sup>c) 3 Mont. & A, 325,

<sup>(</sup>d) Buck, 459.

<sup>(</sup>e) 3 Dea. 31.

<sup>(</sup>f) 2 Gl. & J. 137.

<sup>(</sup>g) 1 Rose, 147.

<sup>(</sup>h) Mont. & B. 314.

<sup>(</sup>i) 1 Mont. D. & D. 657.

not contain an injunction, yet an action will not be permitted upon any matter involved in the account directed by the decree. The analogy between the case of an action at law and that of a fiat in bankruptcy, is not perfect. Undoubtedly, there is this inconvenience in proceeding in bankruptcy, that the petitioning creditor must establish his debt, and to do so he must bring under the consideration of the Court of Bankruptcy the same matters as he brings here. In the present case, however, that I think cannot lead to any great inconvenience, as, after all the accounts have been taken. Mr. Walker will probably be found a creditor of the party moving. Supposing a fiat to issue, it may delay these proceedings for a time, but the Court of Review will take care that such delay shall not cause injustice. If this be a case in which, on general grounds, the defendant ought to be prevented from issuing a fiat, the Lord Chancellor, or the Court of Review, is the proper quarter to which to make an application on the subject. The analogy between an action at law and a fiat in bankruptcy fails here, especially in this, that where the Court stays an action, it generally has a party before it who has no legal defence. In the present case, the party moving declines to admit that he was a trader; and if I stay these proceedings without such an admission on his part, the defendant may lose his evidence. The defendant has done that which amounts to an act of bankruptcy enforced on his debtor; now, if that be an act of bankruptcy it does not protect the property unless the fiat be issued within two months. I am much struck with the circumstance that the plaintiff declines to admit that he was a trader. I do not approve of these proceedings against him, and regret that they have been taken; but as his counsel have deliberately refused to give an undertaking to admit the trading at the period when the defendant's affidavit was made, and to admit such affiPERRY 0.

1842.

PERRY
v.

WALKER.

July 1st.

de Court red to disuper a plain
t, although

The Court refused to dispauper a plaintiff, although in the possession of property, and in the exercise of a business; the possession of the property being wrongful, the wrongful possession acquiesced in by the adverse party, and the business being necessary to the maintenance of himself and

family.

davit, as an act of bankruptcy at any time hereafter, I shall make no order on this motion.

In the interval between the motion for the injunction and the judgment thereon, as before stated, a motion was made to dispauper the plaintiff, who had been admitted to sue in formal pauperis upon the usual affidavit "that he is not worth the sum of 51. in all the world, his just debts being first paid; his wearing apparel and the matters in question in this cause only excepted."

In support of the motion the affidavits of Henry Gridley and Charles Lewis were read. From the former affidavit it appeared that Gridley was tenant to the plaintiff of certain premises at the rent of 221. per annum; that in March 1838, he was served with notice from the defendant as mortgagee of the premises to pay the rent to him; that the deponent nevertheless continued to pay the rent to the plaintiff, or his order, under a bond of indemnity executed to him by the plaintiff, and that such payments, notwithstanding applications made by the defendant, continued to be made either voluntarily or under distresses until Ladyday, 1842, inclusive, and that the plaintiff had since threatened to distrain for the rent due at Midsummer, 1842.

The affidavit of Lewis was to the effect that in March, 1841, the plaintiff entered into a contract with one Cozer to do certain repairs to a house at the price of 2351. That between that time and January, 1842, the plaintiff received from Cozer the sum of 2071. 10s. on account of the contract, and still claimed and had commenced an action in the Court of Queen's Bench against Cozer for a balance of 691. 0s. 6d.

The counter affidavit of the plaintiff admitted the contract of Cozer, but alleged debts owing on the contract exceeding the money to be recovered in the action; "and that after payment of such debts, and excepting the matters in question in these causes, the deponent is not worth the sum of 5*l*. in all the world."

Mr. Cooper and Mr. Wright, for the motion, contended that the circumstances proved on behalf of the defendant were a sufficient ground to dispauper the plaintiff, although in the words of the plaintiff's affidavit, "his just debts being first paid," he might not be worth 5l. The words of the affidavit had from time to time varied, and were not now, if they had ever been, strictly regarded. The Court had always looked to the property which a man had in his possession, and the manner of his living. Prac. Reg. p. 268 (1st ed.); Wy. Prac. Reg. 321; Spencer v. Bryant (a); Lovekin v. Edwards (b); Anon. (per Holt, C. J.) (c); Bartlet v. Smith (d); Romilly v. Grint (e); Deaves's MSS. (f).

Mr. Russell and Mr. Glasse, contrà, cited Raxworthy  $\mathbf{v}$ . Raxworthy (g), and after observing that the contract referred to in the affidavit was entered into in the course of the plaintiff's business, contended that the circumstance of his earning a maintenance by his labour was no ground for dispaupering him.

- (a) 11 Ves. 49.
- (b) 1 Phil. 179.
- (c) 2 Salk, 507.
- (d) In Ch. 8 Nov. 1785.
- (e) 2 Beav. 186.
- (f) The following is an extract from Mr. Deaves's MSS.:—" Pauper—plaintiff, how admitted.— Plaintiff having made the usual affidavit that he is not worth 5l., his wearing apparel and the matters in question excepted, prays that he may be admitted to file his bill and prosecute his suit in forma pauperis, and that A. B. may be assigned his counsel, and C. D. his six-clerk. Answer—Filing the affidavit, be it as prayed."

The reporters have been furnished by the registrar, Mr. Monro, with the following cases, from which it seems doubtful whether, at the time the orders in those

cases were made, the form of the affidavit was uniform.

Dukev. Tovey, 31 Jan. 1705. "The plaintiff, the petitioner, alleges that by reason of his poverty he is not able to proceed, not being worth 5l., as by affidavit on record appears; and therefore &c. Filing the affidavit, let it be as desired.

"J. TREVOR."

Jones v. Harrison, 5th Feb. 1705.

—Plaintiff, petitioner, alleges that by reason of poverty, not being worth 5l. in all the world, his debts paid, his wearing apparel and matters in question excepted, whereof affidavit is made, may it therefore &c. Filing the affidavit, let it be as desired. "J. Trevor."

And see Bowyer v. Halls, R. L. 1700, A. fo. 1.

(g) 16 Law J. 136.

1842.

PERRY v. Walker.

1. Coll. 234

PERRY v. WALKER.

The Vice-Chancellor, in the course of the argument, said that he had always been impressed with the propriety of the opinion of *Holt*, C. J., in the case in *Salkeld*. If the words of the affidavit, as it appeared to be framed in modern times, were to be strictly regarded, the great majority of mankind would have a right to sue as paupers.

The plaintiff's counsel ultimately offered to give an undertaking that the plaintiff should not interfere with the property in question in the suit without the defendant's permission, and to agree to an order for a receiver if required.

The VICE CHANCELLOR.—In this case, it is highly probable that the plaintiff is entirely insolvent—that is, that his affidavit is true, that he is not worth 5*l*. after payment of all his debts. Taking that fact to be so, it is not sufficient to support the order admitting him to sue in formal pauperis, if the order can be impeached on the other grounds which have been taken.

The grounds of impeachment are, first: that the plaintiff had the whole or part of the property in dispute in his possession, and, secondly, that by his own shewing, he has other property, which maintains him in such a manner as to preclude the assertion of pauperism. As to the first ground, the possession is altogether wrongful, if it is possession. . When he had mortgaged to the defendant, and the defendant had given him notice not to interfere with the mortgaged property, he from time to time wrongfully and improperly demanded and received rent from the tenants. Considering that the possession of the plaintiff, if any, is wrongful—that the property has been acquired by him by aggression, if at all,—considering also the length of time during which the adverse party (himself a member of the legal profession) has known of the wrongful acts of the plaintiff and acquiesced in his carrying

on the suit in the character of a pauper, I think it would be giving these acts too much weight to treat them as equivalent to the possession of property. I think it would be too much not to take the undertaking and consent which he is willing to give, that is to say, not to interfere with the property, and not to object to a receiver.

PERRY v. WALKER.

The next point made is, that the plaintiff has acquired property by the exercise of his trade. It appears that at one time he kept a public-house, and that he has carried on the business of a bricklayer. Having been released from imprisonment he has been endeavouring to maintain himself by his labour. I agree in the observation that a party preferring labour rather than becoming an incumbrance on the parish does not lose the right of suing in forma pauperis. To hold the contrary would be hard, and a discouragement to honest industry. In order to dispauper a man, he must be shewn to be living in the apparent enjoyment of substantial means, that is to say, substantial with reference to his station and position in society, or carrying on business in a way inconsistent with the character of a pauper. If that had been so here, I should have felt little or no difficulty in dispaupering the plaintiff. But it does not appear from the affidavits where he was residing or how living; whether in an humble lodging or a house of his own, or in short what are his apparent means, or the means which he exhibits to the world. It has only been shewn that he has been in an employment, in which or to which, he says, he has been assisted by considerable loans. It appears, indeed, that he has been suing a party at law without proceeding in formal pauperis, and I was at first struck with that circumstance; but it may be remarked that he might not be able to make a proper affidavit in that cause by reason of his property in this: which property is the subject of examination here, though there it would not be so. That removes the

PERRY v. WALKER.

objection upon that point. Therefore, not knowing how he is carrying on business, except that he is working for money for the purpose of providing for his family, and not living on charity, I think it would be unsafe to dispauper him upon the grounds suggested; and upon the whole, though not blaming the defendant for making the motion, I think it right to dismiss it and to receive the plaintiff's undertaking and consent.

July 7th.

## NEWMAN v. LADE.

Testator, by his will, directed that his trade should be carried on by his daughter and others, as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the funds, and the funds held in trust, as to one moiety, for the benefit of the daughter and her children, and as to the other moiety, for the benefit of the children of his brother. By a codicil, the testator revoked that part of his will which empowered his trustees to sell his effects, and instead thereof, he authorized his daughter to take possession

THOMAS NEWMAN, who carried on the business of a brush-maker, by his will, dated the 2nd April, 1840, after bequeathing 1000l. to his friends James Trenow and Charles Robinson, their executors, &c., in trust for the benefit of his daughter, Mrs. Heath, and her children, bequeathed as follows:—"Whereas, by a policy of assurance, dated the 16th October, 1822, the European Life Assurance Society did assure to me the sum of 3000l., to be paid to my executors, administrators, or assigns, after my decease: Now I do hereby give and bequeath the said sum of 3000l., and all accumulations to arise therefrom (if any), and also all my leasehold estates, ready money, securities for money, book and other debts, stock in trade, and utensils used therein, goods, chattels, and other personal estate and effects whatsoever, not hereby otherwise disposed of, unto the said James Trenow and Charles Robinson, their executors, administrators, and assigns, upon and for the several trusts, intents, and purposes following, (that is to say,) upon trust, with all convenient speed after my decease, to sell and dispose of, collect, get in, and convert into money, my said personal estate, except the lease or leases of the pre-

of all furniture, stock in trade, and every description of property found on his, the testator's, premises, to be disposed of at her discretion:—*Held*, that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will.

mises now occupied by me as a manufactory, and my stock in trade and utensils; and thereout to pay my just debts. funeral, and testamentary expenses, and set apart and appropriate the said legacy of 1000l, and lay out and in. vest the residue or surplus of such money or personal estate in the names or name of the said trustees or trustee for the time being, in some of the public stocks or parliamentary funds of Great Britain, or upon real securities in England, and from time to time to alter, vary, and transpose at their or his discretion the same stocks, funds, and securities, or any of them: and as to the said lease or leases of my manufactory, and my said stock in trade and utensils of a brush manufacturer, my will is, and I hereby direct, that my trustees or trustee for the time being of this my will do and shall carry on and conduct the same, and transact all matters and things relating thereto, in conjunction with my daughter Isabella Anne, the wife of John Searles Lade, for the space of ten years next after my decease; and for that purpose I authorize and empower my said trustees and trustee for the time being to hire and employ such persons, with such salaries as they or he shall think proper, and to enter into such contracts and agreements, and to make such engagements respecting the premises as they or he shall think reasonable, and to increase or abridge the said business or concern and my capital therein, and to adjust and settle all accounts in which I shall be interested, and to refer any disputes concerning the same to arbitration, and to compromise and compound any debts owing to me, and to pay and satisfy any claim and demand made, upon or against my estate which my trustees shall deem to be fair and just, and to make any sales upon credit, and generally to transact all matters respecting my said business, and to do all acts and deeds relative thereto in such and the same manner to all intents and purposes as if such trustees or trustee were absolutely entitled to or interested in the premises, it being

NEWMAN D.

NEWMAN V. LADE.

my intention to give my trustees for the time being full discretionary power and authority to carry on my said business, in conjunction with my said daughter Isabella Anne Lade, in such manner as to them or him shall seem most advantageous and most for the benefit of the persons interested under the trust hereinafter expressed. And I hereby declare, that all losses, charges, and expenses attending or to be incurred in the carrying on of my said business shall be borne and defrayed, in the first instance, out of the gains and profits thereof, and, if they shall be insufficient, then out of my residuary personal estate, and the money to arise therefrom; and all the gains, profits, and increase of the said business shall be added to, and considered as part of the said residuary personal estate, and shall be applied and go in such manner as hereinafter is directed. And my will is, that my trustees or trustee for the time being shall, from time to time after my decease, take annual accounts of the stock and capital employed in my said trade, and shall make out annual accounts of the gains, profits, losses, and expenses of the same, and of all transactions relating thereto, which accounts shall be audited and settled by my said daughter Isabella Anne Lade. And I will and direct that the clear gains and profits to arise from, or to be produced by, my said trade or business during such time as the same shall be carried on as aforesaid, shall be paid, applied, and disposed of in manner following, (that is to say), my said daughter Isabella Anne Lade shall have and be entitled to one moiety of the said gains and profits for her own separate use and benefit absolutely; and the remaining moiety of the said gains and profits shall be paid and applied for the maintenance and support of the five children of my son Edward Mark Newman, hereinafter named, in such shares and proportions, and in such manner as my trustees shall in their discretion think proper. Provided always, and it is my will, that if my trustees or trustee for the time being shall find it disadvantageous, or deem it unadvisable, to carry on my said business, then and in such case it shall be lawful for them or him absolutely to close and discontinue my said business, and all accounts and transactions relating thereto; and my will is, that upon such determination of my said business my trustees or trustee for the time being shall sell, collect, and convert into money all the capital stock. leases, monies, and other effects belonging to or used in the same, and shall thereout pay all debts and expenses owing and incurred from and on account of the same, and adjust and settle all accounts relating thereto; and as to the clear surplus of the monies into which the capital of my said business shall be converted on the same being closed, as also the residue or surplus of my personal estate and the monies to arise therefrom, my will is, that my trustees and trustee for the time being do and shall lay out and invest the same, from time to time, in their or his names or name in some or one of the public stocks, funds, or securities hereinbefore mentioned. And I hereby declare my will to be, that my said trustees shall stand and be possessed of, and interested in, all my said residuary personal estate and effects, and the monies to arise from my said business of a brush-manufacturer from the conversion into money of the capital thereof, when the same concern shall be closed, and the stocks, funds, and securities in or upon which such residuary personal estate shall be laid out or invested, or which shall otherwise form any part thereof respectively, and the dividends, interest, and annual produce thereof, upon and for the several trusts, intents, and purposes following, (that is to say), as to one equal moiety or equal half part of the trust monies, stocks, funds, and securities, constituting my residuary personal estate, upon trust from time to time to pay the dividends, interest, and annual produce arising therefrom, unto my said daughter Isabella Anne Lade, during the term of her natural life, for her separate use,

1842. NEWMAN v. Lade. NEWMAN v. Lade.

free from the control and debts of her present or any future husband, and so that during any coverture she may be under she shall have no power to alien or anticipate the growing payments of the said dividends and interest and annual produce, or any part thereof; and immediately after the decease of my said daughter Isabella Anne Lade, I give the said one moiety, or equal half part or share of and in my said trust monies, stocks, funds, and securities, and residuary personal estate, in trust for such child or children of my said daughter Isabella Anne Lade as shall attain the age of twenty-one years or marry, if more than one, in equal shares, for the absolute use and benefit of such child or children respectively," &c. [Here followed clauses of survivorship, maintenance, &c.] "And as to the other or remaining moiety, half part, or share of and in my said residuary personal estate, and the produce thereof, I direct and declare, that my trustees shall stand possessed thereof for the benefit of James, Frances, Jane, Samuel, and Francis, the five children of my said son Edward Mark Newman, who are now living with me, upon and for trusts and purposes, and with and subject to powers and authorities similar to, and in all respects corresponding with the trusts, purposes, powers, and authorities expressed and declared concerning the one moiety lastly hereby bequeathed, after the decease of my said daughter Isabella Anne Lade, in trust for her children."

On the 13th of the same month of April, the testator made the following codicil to his will:—"I hereby revoke and cancel that part of my will executed the 2nd instant, April 1840, which empowers my trustees, Mr. James Trenow and Mr. Charles Robinson, to sell my effects. Instead thereof I hereby authorize my daughter Isabella Anne Lade to take possession of all furniture, stock in trade, and every description of property found on my premises, to be disposed of at her discretion."

The testator died soon after the date of his codicil, and

in September of the same year the present bill was filed, which, after suggesting that the business had not been carried on properly since the testator's death, prayed the usual accounts of his estate, and that directions might be given for carrying on the business according to the trusts of the will, or for winding it up.

NEWMAN 9. LADE.

Mr. Walker and Mr. Stinton, for the plaintiffs.

Mr. Russell and Mr. Hardy, for the defendants Mr. and Mrs. Lade, contended, that the trust created by the will for carrying on the testator's trade, was entirely destroyed by the codicil, and that Mrs. Lade was absolutely entitled to the property comprised in the codicil. Sugd. Powers Vol. 1, p. 119.

Mr. Evans, for other parties.

THE VICE-CHANCELLOR.—The testator, by his will, in effect directed all his property to be converted into money, subject to this, that the money and stock in trade are to be employed in carrying on the business for ten years after his death. No sale of the stock is to take place during the ten years, except what is incident to the ordinary course of the trade. One moiety of the profits is given to the testator's daughter for her separate use, the other moiety is given to the children of his brother, who are plaintiffs in the suit. At the end of the ten years the trustees are to sell the whole business, and subject to the daughter's lifeinterest in one moiety, the proceeds are to be divided between her children and the children of the testator's brother. There is an anxiously expressed intention that the children shall take this interest. Then there is this codicil-"I hereby revoke and cancel that part of my will executed the 2nd instant, April 1840, which empowers my trustees, Mr. James Trenow and Mr. Charles Robinson, to

NEWMAN v.

sell my effects;" "and instead thereof," that is, instead of that part of my will which directs my trustees to sell my effects, "I hereby authorize my said daughter to take possession of all furniture, stock in trade, and every description of property found on my premises, to be disposed of at her discretion." The intention here is, as I collect it, to exempt the daughter more or less from the co-operation of the trustees, and to give her sole authority and discretion in the sale of his property, but only as trustee. All that the testator revokes and cancels by his codicil is, that part of his will which directs his trustees to sell his effects. Here is no intention to interfere with the enjoyment of the property, or, at at all events, to interfere more than may be necessary for the purposes of the sale. In the construction of instruments the rule of the civil law, certa pro incertis non relinquenda, is, I apprehend, a wholesome rule to follow. In a late case of Shipperdson v. Tower (a), to which I refer only as expressing my present opinion, the observations that I made in reference to one of the codicils were these:-- "To give it any other effect would, as it seems to me, be to allow an intention strongly and clearly expressed by one testamentary instrument to be defeated by expressions of a doubtful and obscure nature in another, which ought not to be." Here an intention, anxiously and strongly expressed in the will, is sought to be overruled by expressions in the codicil, which are at the utmost obscure and ambiguous. I think the daughter cannot say more than that the codicil brings the enjoyment of the property into doubt. I am of opinion, that I cannot hold that it does interfere with the enjoyment of the property.

I expressed a doubt, in the course of the argument, as to the propriety of proceeding in the execution of the trusts of this will without trustees, and a difficulty may be raised in that respect; because one possible view of the case is, that the will enables the daughter to carry on the business, as a trustee no doubt, but without the intervention of other trustees. It is not necessary at present to adjudicate upon that part of the case, because I think there is a sufficient case made by her answer to authorize me to direct an inquiry, whether the business has been carried on since the testator's death in a manner conformable to the testator's will. [This and other inquiries were then directed.]

NEWMAN U.

On this day the *Vice-Chancellor* said, upon further consideration, he was confirmed in the opinion which he had before given in this case; more especially as by the *will* of the testator the interest given to the daughter was to her separate use.

July 11th.

1842.

July 13th, 18th, 19th, & 25th.

By a marriage settlement, 20.000l., the fortune of the wife, was assigned to trustees upon trust. subject to life interests of the husband and wife, as to one moiety for the eldest son of the marriage, and as to the other moiety for the younger children. By the same settle-

## THE EARL OF CLARENDON V. BARHAM.

BY indentures of settlement dated respectively the 24th and 25th July, 1792, and made in contemplation of a marriage which was shortly afterwards solemnized between Joseph Foster Barham and Lady Caroline Tufton, a sum of 20,000l., the fortune of Lady Caroline, was assigned or assured to Elborough Woodcock and William Cardale, their executors &c., upon trust to pay the annual produce thereof to or for the benefit of Joseph F. Barham and Lady Caroline during their joint lives and the life of the survivor of them in manner therein mentioned, and after

ment, a certain plantation in Jamaica, of which the husband was seised in fee-simple, was conveyed to the use of trustees for a term of 500 years, upon trust, if the husband should so appoint, to raise 10,000% for his absolute use, and subject to such term, and to the life-interests of husband and wife, to trustees for 1000 years, upon trust to raise 20,0001. for the eldest son, 10,000!. for the younger children, and again 10,000!. for the eldest son. The settlement contained a proviso that the portions should be raised according to their priority, as stated in the settlement. Soon after the marriage the husband exercised his right of raising 10,000*l*. for his own use, and for that purpose the trustees of the 500 years' term borrowed of the trustees of the wife's fortune 10,000*l*., and executed to the latter a mortgage of the premises comprised in the 500 years' term. The husband and wife died, leaving five children of the marriage; the husband having by his will, after directing payment of his debts, and devising certain property not situated in Jamaica, devised all his residuary real and personal property to his eldest son, J., and appointed him his executor. Upon the death of the testator, J. proved the will, acted as executor, and entered into possession of the estates in Jamaica, of which he kept possession, paying the interest of the younger children's fortunes, until 1837, when he became a lunatic, shortly after which he died intestate and unmarried, leaving the four younger children surviving him, of whom W. was his heir-at-law. No arrangement had ever been entered into amongst the children relative to the charges in the settlement, nor was there any strong evidence of the intentions of J. as to the extinguishment of those charges to which he was entitled :-Held,

1st, That, under the foregoing circumstances, it was most for the benefit of J. that his charges on the Jamaica estate should be considered as not having been extinguished in the inheritance, and consequently that they were not extinguished.

2ndly, That he was not bound to apply the rents and profits which he received in reduction

of his charges; but,

3rdly, That a sum for slave compensation money, which he received as "devisee" of his father, must, as between the several charges, be applied in reduction of the first charge of 10,000%, and that the personal representative of J. or his father must account for interest on that sum during the life of J.

A person mortgages an estate, and, by his will, after directing payment of his debts, devises all his residuary real estates, (including the mortgaged estate), and all his residuary personal estate to his eldest son, whom he appoints his executor. The son proves the will, and dies intestate, without having paid off the mortgage. Both father and son leave sufficient personal assets to pay off the mortgage :- Decreed, on the authority of modern cases, but reluctantly, and against the opinion which independently of them the judge would have entertained, that as between the heir and administrator of the son, the mortgaged estate is the primary fund for payment of the mortgage.

the decease of the survivor in trust as to one moiety of the said capital sum, and the interest and annual produce to become due thereon, for the eldest or only son of the marriage, and as to the other moiety and the interest and annual produce to become due thereon, upon trust to pay, assign, and transfer the same to the only child, or between and amongst all and every the children (if more than one), of the marriage, other than and except an eldest or only son, in such shares and proportions &c. as the said J. F. Barham and Lady Caroline, or the survivor of them, should in manner therein mentioned appoint, and in default of such appointment, upon trust to assign, transfer, and pay the same to such only child, or between and amongst all such children, except an eldest or only son, in equal shares and proportions (if there should be more than one) share and share alike; the shares of the sons to vest at their respective ages of twenty-one, and those of the daughters at their respective ages of twenty-one or days of marriage. Power was given to the trustees or the survivor of them, or the executors of the survivor, with the consent in writing of the intended husband and wife, or the survivor of them, and after the decease of the survivor, then at the discretion of the trustees or trustee, to invest the 20,000l. upon government or real securities in England or Wales, or in the West Indies, and from time to time to vary the securities.

By the same settlement Joseph Foster Barham conveyed to Sackville, Earl of Thanet, and Charles Tufton, their heirs, executors, administrators, and assigns, a certain estate in the island of Jamaica called the Mesopotamia Plantation, together with the slaves, cattle, buildings, and utensils thereto belonging, to the use of J. F. Barham, his heirs, executors &c., until the solemnization of the marriage; then to the use of trustees for a term of 500 years; then to the use of J. F. Barham and his assigns for his life; then to the use of trustees for a term of ninety-nine

EARL OF CLARENDON 0. EARL OF CLARENDON v. BABHAM. years for securing a jointure to Lady Caroline; then to the use of trustees for a term of 1000 years, and subject to the foregoing limitations, to the use of Joseph Foster Barham, his heirs, executors, administrators, and assigns.

The settlement contained a declaration that the term of 500 years was limited to the trustees thereof (Thomas Barham and Thomas Plummer) upon trust, that in case the said Joseph Foster Barham should at any time or times thereafter, by deed or will executed as therein mentioned, direct or appoint the raising and payment of any sum or sums of money not exceeding the sum of 10,000l. to or for any person or persons whomsoever, at any time or times either before or after his own decease, and to be chargeable upon and payable out of the plantations, hereditaments, and premises expressed to be thereby granted and released, then and in such case the said Thomas Barham and Thomas Plummer, or the survivor of them, or the executors, administrators or assigns of such survivor, should, by mortgage or demise of the said plantations, hereditaments, and premises, or of a competent part thereof, for all or any part of the said term of 500 years, or by and out of the rents, profits, crops, and produce thereof, or by any other ways or means whatsoever, levy, raise, and pay all and every such sum and sums of money not exceeding 10,000l. as aforesaid, which the said Joseph Foster Barham should direct or appoint to be raised in manner aforesaid, together with interest for the same not exceeding 51. per cent. per annum from the time the same should be so directed or appointed to be raised, and should pay all and singular such sum and sums of money and interest unto such person or persons, and for such intents and purposes as the said Joseph Foster Barham should so direct and appoint. And upon further trust that, in the mean time and until the same sum or sums of money should be so directed or appointed to be raised, they, the said trustees or the survivor of them &c., should permit and suffer the rents and profits of the

same premises and every part thereof to be received, had, and taken by the person or persons who should be entitled to the freehold and inheritance thereof.

EARL OF CLARENDON

The trusts of the term of 1000 years (which was vested in Woodcock and Cardale) were declared to be to raise by sale or mortgage, or other disposition of all or any part of the premises comprised in the term, or by and with the rents, profits, crops and produce thereof, but subject to the jointure limited to Lady Caroline, the sum of 20,000l. of lawful money of Great Britain, and pay the same to the eldest or only son of the marriage (with other directions in the event of there being no such son): and upon further trust, in case there should be one or more child or children of the marriage besides an eldest or only son, to raise by the ways and means aforesaid the further sum of 10,000l., and pay the same to such child or (in case there should be more than one) to such children in such shares and proportions, at such times, and subject to such restrictions and limitations as the said J. F. Barham and Lady Caroline, or the said J. F. Barham surviving Lady Caroline, should by deed or will appoint; and in default of such appointment, to pay the same to such child or (as the case might be) to such children equally, share and share alike. And upon further trust, in case there should be an eldest or only son of the marriage, to raise by all or any of the ways and means aforesaid, 10,000l. for the benefit of such eldest or only son.

The settlement contained a proviso that the several and respective portions or sums of money, thereinbefore provided to be raised, should be raised in the order and priority in which they respectively stood, and were placed in the settlement.

Soon after the marriage, Joseph Foster Barham being desirous of raising the sum of 10,000*l*. under the power given him by the settlement, an arrangement was entered

EARL OF CLARENDON 0. BARHAM.

into with the trustees of Lady Caroline's fortune for advancing to him 10,000l., being one moiety of the 20,000l. which they held in trust, and which they had power to advance on real security. Accordingly, by an indenture dated the 5th February, 1798, and made between J. F. Barham and Lady Caroline Barham of the first part, Thomas Plummer and Thomas Barham of the second part, and Woodcock and Cardale of the third part, it was witnessed that Joseph F. Barham, in execution of the power given to him for that purpose by the settlement &c., did direct and appoint the immediate raising and payment of the full sum of 10,000l. unto him the said Joseph Foster Barham for his own sole use and benefit, and that the same should be chargeable upon and payable out of the said plantation, hereditaments, and premises; and it was by the same indenture further witnessed that, in pursuance of the direction last thereinbefore contained, and in consideration of 10,000l. paid to the said Joseph Foster Barham by the said Woodcock and Cardale, being one moiety of the fortune of Lady Caroline, and for the nominal consideration therein mentioned, they, the said Thomas Barham and Thomas Plummer, bargained, sold, assigned, and transferred, and Joseph Foster Barham ratified and confirmed unto Woodcock and Cardale, their executors &c., all the said Mesopotamia Plantation, and all and singular the negro and other slaves, stock and cattle, coppers &c., houses, utensils, and implements thereto belonging, and all other the premises comprised in the term of 500 years as aforesaid, to hold the same unto said Woodcock and Cardale, their executors, administrators, and assigns, from the day of the date of the said indenture for the residue of the said term of 500 years, but subject to a proviso for redemption of the premises on payment by the said Thomas Barham and Thomas Plummer, their executors, administrators or assigns, or the said Joseph Foster

Barham, his heirs, executors or administrators, or the person or persons who should for the time being be entitled to the freehold and inheritance of the same estates, plantations, hereditaments and premises, expectant upon the determination of the said term of 500 years, unto the said Woodcock and Cardale, their executors, administrators or assigns, of the sum of 10,000% of lawful money of Great Britain, with interest for the same at and after the rate, at the time, and in manner therein mentioned.

In the years 1800 and 1803, Joseph Foster Barham being seised in fee of an estate in Jamaica, called the Island Estate, subject to a mortgage of 7000l., it was arranged that the remaining moiety of Lady Caroline's fortune, which was now improved to 10,773l., should be advanced to him for payment of that mortgage, and for his other occasions. Accordingly, by several indentures, and ultimately by an indenture of the 2nd May, 1803, which was made by J. F. Barham of the one part, and Cardale, who had survived Woodcock his co-trustee, of the other part, Barham, in consideration of the 10,773l. which had been advanced to him, for the purposes before mentioned, in several sums, conveyed the Island estate, with its slaves and appurtenances to Cardale, his heirs and assigns, subject to a proviso for reconveyance to Barham, his heirs, appointees or assigns, on payment by Barham, his heirs, executors or administrators, or any or either of them, unto Cardale, his executors, &c. of the principal sum and interest, at the time, and in manner therein mentioned.

There were five children only of the marriage, viz., John, William Joseph, Charles Henry, Mary, and Caroline Gertrude.

By deed-poll, dated the 10th January, 1831, Joseph Foster Barham and Lady Caroline, his wife, appointed the sum of 10,000*l*., which was directed to be raised for that purpose under the term of 1000 years, amongst their four younger children. The appointment was of unequal shares,

EARL OF CLARENDON

BARHAM.

EARL OF CLARENDON 5. BARHAM. but by an arrangement amongst the younger children it was agreed that the shares should be considered equal.

Joseph Foster Barham by his will, dated the 22nd June, 1832, after directing that all his just debts, funeral expenses, and the costs and charges of proving his will, and any codicil or codicils thereto, should be paid and discharged by his executors thereinafter named, as soon as conveniently might be after his decease, by and out of his personal estate not thereinafter specifically bequeathed, and after bequeathing 500% a-piece to his younger children, and charging an annuity for the benefit of his wife on certain estates in Pembrokeshire in exoneration of the jointure charged on the estates in Jamaica, and after making various specific devises and bequests of real and personal estate not affecting his estates in Jamaica, devised as follows:--"And as to all the rest, residue, and remainder of my estate and effects, both real and personal, including the freehold and reversion, and my remaining beneficial estate and interest whatsoever, of and in the estates hereinbefore devised, and as to all and singular my securities for money, goods, chattels, estates and effects whatsoever and wheresover, not hereinbefore specifically bequeathed, whereof or wherein I, the said Joseph Foster Barham, or any person or persons in trust for me was and are, or is or shall, at the time of my decease, be seised, possessed of, or entitled unto, either in possession, reversion, remainder or expectancy, or otherwise, or over which I have any power of appointment by way of disposition, I hereby give, devise and bequeath, direct, limit, and appoint the same (subject as to my personal estate to the payment of all my just debts, funeral or testamentary expenses, and the several legacies hereinbefore given and bequeathed, and which are not hereby specifically charged on any part of my real estate) unto and to the use of my son John Barham, his heirs, executors, administrators and assigns, according to the natures and qualities thereof respectively, to and for his and their own use and benefit absolutely and for ever." And the testator appointed Lady Caroline Barham, John Barham, and Henry, Earl of Thanet, his executors.

EARL OF CLABENDON V. BARHAM.

The testator died in September, 1832, and Lady Caroline in November following, leaving the several beforenamed children surviving them, and without having made any appointment of any part of the settled property otherwise than as before mentioned.

Soon after the testator's death his will was proved by the executors, but Lord Thanet did not act. John Barham immediately, upon the death of the testator, entered into possession of the Mesopotamia and Island estates, and took possession of his father's personal estate. In 1835, he preferred his claim for compensation-money in respect of the slaves on both plantations. No counter-claim was made before the commissioners, and he received in the whole 1200%. on that account: the adjudication being made to him as devisee and owner of the estates.

John Barham regularly paid to the four youngest children interest on their respective shares of the moiety of 20,773*l.*, and of the 10,000*l.*, provided for them by the settlement. In 1885, he contracted with his brother Charles for the purchase of part of the share of the latter in his mother's fortune, and by an instrument of 1836 that contract was carried into execution, the portion assigned being to the value of 2000*l.* 

In March, 1837, John Barham was declared a lunatic, and in May, 1838, he died intestate and without issue.

The bill was filed by Katherine Barham, the widow and administratrix of John Barham, and, upon her marriage with the Earl of Clarendon, revived against William Joseph Barham, his brother and sisters, and the representatives of the trustees. It charged, that upon the death of Joseph Foster Barham, the plantation called Mesopotamia was not nearly of sufficient value to have raised and paid the several hefore-mentioned sums of 10,0001., 20,0001., 10,0001. and

EARL OF CLARENDON 9. BARRAM. 10,000l., and that the Island plantation was not more than of sufficient value to have raised and paid the before-mentioned sum of 10,773l.; that after the death of Joseph F. Barham, John Barham always intended that the charges upon the Mesopotamia estate should be raised and paid according to their respective priorities, and that the charge upon the Island estate should be raised and paid thereout; that he acted in accordance with that intention by employing agents to manage the estates, paying interest on the charges, and otherwise; and that he had frequently expressed his opinion, in conversation, that the Mesopotamia estate would not bear all its charges, but that they, including his own, must be paid according to priority.

The bill prayed accounts of what was due in respect of the several charges, and that the Mesopotamia estate might be sold and the produce applied in payment of what should be found due in respect of the several charges, according to their priorities; that the defendant, William Joseph Barham, might be decreed to redeem the Island estate upon payment of the sum of 10,7781. charged upon it, or that he might stand foreclosed and the estate be sold &c.; for an injunction to restrain him from proceeding to recover the estates, and for a receiver, manager, &c.

The case made by the answers was, in substance, this:

—That upon the death of Joseph Foster Barham, John Barham took possession of the estates and occupied them until his lunacy, as beneficial owner, and not in any other capacity; that having become entitled in fee to the plantations, the charges to which he was previously entitled under the settlement became merged and extinguished in the inheritance, and that upon his death the estates descended to the defendant, J. W. Barham, subject only to such of the incumbrances as were for the benefit of the younger children (including the 2000). assigned to John Barham). The question as to the redemption of the Island estate was submitted by the defendants to the judgment

of the Court. They denied the insufficiency of the estates to meet the charges.

EARL OF CLABENDON O. BARHAM.

Evidence was entered into on both sides. The object of the plaintiffs' evidence was to shew the intention of John Barham to keep the charges on foot.

Mr. Tinney, and Mr. James Parker, for the plaintiffs.— The charges which John Barham had upon the Mesopotamia estate were these: 10,000l., being that moiety of the fortune of Lady Caroline Barham, which was lent on the security of the Mesopotamia estate; 20,000l., which by the settlement was directly charged upon the same estate; 2000l., which had been assigned to him by Charles, and 10,000%, which was the last charge under the settlement. It was competent to John Barham to choose to have these charges kept on foot or merged. The question is, which was most beneficial for him at his father's death. If the first charge merged, it would be postponed to all his father's incumbrances. No court of equity would consider that a man having a first charge would give up that charge, so as to let in his father's creditors: Forbes v. Moffat (a). The father's estate had never been administered in this Court. Admitting that an heir-at-law might be presumed to have his charge merged, the case is different here, because the estate is directed to be sold. with respect to the second charge, if it be considered to have merged, he loses his priority. Independently, therefore, of any act or conduct on the part of John Barham, the Court will presume that it was his intention to keep these charges on foot. In treating of this doctrine of presumption, it is immaterial whether you are dealing with the legal estate or an equitable charge: Astley v. Milles (b), Donisthorpe v. Porter (c). And it may be

<sup>(</sup>a) 18 Ves. 384. (b) 1 Sim. 298; see p. 343. (c) 2 Eden, 162; Ambl. 600.

EARL OF CLARENDON S. BARRAM. remarked in favour of such presumption, that in case of a sale of the estates, it would be desirable for the purchaser to purchase the actual subsisting charges of 1792, because they would over-ride every other incumbrance of which the purchaser might have had notice; while, on the other hand, a dry legal estate would not protect the purchaser against anything of which he might have had constructive notice: Toulmin v. Steere (a).

The acts and conduct of John Barham, as far as they go, are in accordance with what is conceived to be the right presumption in this case. Instead of paying off the younger children's fortunes, he paid interest on them. He also received the whole slave compensation-money in respect of the two estates. As to the compensation-money, as no counter-claim was presented under the act of Parliament, it is submitted that he is entitled to the whole: Hill v. Reardon (b), Lloyd v. Lord Trimlestown (c).

Lastly, the plaintiff is not bound to redeem the Island estate, but the defendant William Joseph Barham takes it cum onere: Scott v. Beecher (d), Lord Ilchester v. Lord Carnarvon (e).

Mr. Wigram, and Mr. Lloyd, for the defendant William Joseph Barham.—The general rule is, that where a person is seised in fee of an estate, and is also entitled to a charge on it, if he does no act to keep the charge on foot, it merges in the inheritance: Tyler v. Lake(f), Brown v. Stead(g), Smith v. Phillips(h). In order to keep alive the charges in cases of this nature, there must be some strong indication of intention to that effect: Lord Selsey v. Lord Lake(i), Parry v. Wright(j). [The Vice-Chancellor.—Was

- (a) 3 Mer. 210.
- (b) 2 Russ. 608.
- (c) 4 Sim. 296.
- (d) 5 Madd. 93.
- (e) 1 Beav. 209.

- (f) 4 Sim. 351.
- (g) 5 Sim. 535.
- (h) 1 Keen, 694; see 3 Beav. 513.
- (i) 1 Beav. 146.
- (j) 1 Sim. & S.369; 5 Russ.142.

Toulmin v. Steere decided on that principle? That case was one of contract, the present is between volunteers. Sir William Grant's observations in Forbes v. Moffat shew, that the principles as to merger in these cases arise out of the actual or presumed intention of the party entitled to the charge on the one hand, and the beneficial ownership on the other. "Upon this subject," he says, "a court of equity is not guided by the rules of law. sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged." These observations are applicable to a charge secured by a legal estate, as well as a mere equitable charge. Then, what is the evidence of John Barham's intention to keep these charges on foot against the heir? It does not appear that his father left any debts: at all events it is clear that John Barham believed that all his father's debts were paid. If so, the argument, that the charge was available for postponing his father's debts, is at an end. Is the mere possibility of the existence of debts a sufficient

ground for presuming an intention to keep the charge on foot?

But whatever be the situation of these charges, if the personal estate of the testator Joseph Foster Barham and the corpus of the real estate are not sufficient to pay them, the defendant is entitled to have the rents and profits received by John Barham, applied pro tanto in reduction of the charges. For this purpose the rents and profits must be considered as part of the land itself: Brudenell v. Boughton (a). In cases where land has been equitably charged by will for the payment of debts and legacies, and

EARL OF CLARENDON U. BARRAM.

there is a deficiency of assets, it has been usual to insert in decrees in administration suits, a direction that the heir or devisee shall account for the rents and profits which he has received: Seton on Decrees, pp. 86, 89, 93; Fenoulet v. EARL OF CLABENDON 5. BABBAM. Passavant (a). If that be the constant course, and if a mortgage is a debt, and if, as in this case, the pledge is the only security, how can John Barham be allowed to apply to his own use the surplus of the rents and profits, he having entered with notice of the trust, and, from the circumstances of the case, being fully aware that the corpus of the estate was insufficient to pay the charges upon it?

Then, as to the question whether the Island estate is the primary fund for the payment of the mortgage upon it. In support of the affirmative of that proposition Scott v. Beecher has been cited. It is remarkable, however, that no authority appears to have been produced in argument, or relied upon in the judgment in that case, in support of the particular point which it decides. Sir John Leach is reported to have said, that by the gift to Elizabeth Tyson, as residuary legatee, the personal estate of James Tyson became her personal estate. That, however, was assuming the very point in issue between the parties. How could it be her personal estate until she, as executrix, had paid the testator's debts, or done some act to change the previous liability from the personal to the real estate? [The Vice-Chancellor.—There is a line in the judgment, which glances at some evidence which would render the application of the general principle in that case unnecessary. I allude to the words, "She elected," &c. ]

Mr. Koe, Mr. Hall, Mr. Romilly, Mr. Jeremy, and Mr. Shadwell, appeared for other parties.

Mr. Tinney, in reply.—In Scott v. Beecher the widow chose to take the personalty which the testator had given her. She became his residuary legatee, and also his debtor for so much of the personalty as was required for payment

of his debts. But it was the testator's debt, and not hers. for which the estate was mortgaged; her personal representative, therefore, was clearly not responsible for that debt, and the heir was held bound to take the estate cum onere. [The Vice-Chancellor observed that the same point might have been, but did not appear to have been made in Perkyns v. Bayntun (a). He also referred to Gilbert's Lex Præt. (b), and Lord Belvedere v. Rochfort (c).] The passage in Gilbert was cited, but without success, before Lord Lyndhurst, C. B., in Evans v. Smithson (d), which his Lordship decided in accordance with Scott v. Beecher. The case of Lord Belvedere has been observed upon by Lord Thurlow in Tweddell v. Tweddell (e), and by Lord Alvanley in Woods v. Huntingford (f).

1842. EARL OF CLARENDON v. BARHAM.

THE VICE-CHANCELLOR.—In this case the parties have July 25th. expressed a wish that the questions between them should be decided by the Court at the present stage of the cause rather than at a later period, and the facts proved, and those not disputed, render this to a great extent, if not altogether, practicable, without any substantial impropriety or singularity. The first question is as to the capital sums,

- (a) 2 P. W. 664, n.
- (b) "If the grandfather mortgages his lands, and covenants to pay the mortgage money, and the land descends to the father, and the father dies, leaving a personal estate of his own, it shall not go in expneration of the mortgage of those lands descended to the grandson, because the personal estate of the father was not liable to the grandfather's debt, and there is no equity that any part of the personal fortune of one should be applied in exoneration of such debt. Whence it seems that if the father had been executor to the grandfather, and the

grandfather had left assets to the value of the debt, and the father had converted them to his own use, then so much of the father's personal estate had been liable to the payment of the grandfather's debts; and the grandson could, in such case, have come upon the father's executors, to exonerate the mortgage out of the father's personal estate." And see Treat. Eq. Vol. 2, p. 289.

- (c) 5 Bro. P. C. 299 (ed. Toml.).
- (d) Not reported.
- (e) 2 Bro. C. C. 101.
- (f) 3 Ves. 130.

EARL OF CLARENDON U. BARHAM.

which by the settlement of 1792, executed on the marriage of Mr. Joseph Foster Barham and Lady Caroline Tufton, were charged upon an estate in Jamaica, called the Mesopotamia estate, in favour of the eldest son, and the other children of the marriage respectively in unequal proportions. It is contended, on the part of some of the defendants, that so much of these sums as the eldest son, Mr. John Barham, became entitled to, has been wholly or partially extinguished in the inheritance of the estate charged, he having acquired that inheritance by descent or devise from his father. The title is so circumstanced, that this is a question of intention; not of merger, independent of intention. So far as the acts and conduct of Mr. John Barham are in proof, I think that they do not afford any evidence whatever of any intention of extinguishment on his part, but that they rather tend the contrary way. Assuming, however, the evidence of acts and conduct on his part to be none or neutral, it must be considered which view was the more favourable to his interest -what intention a prudent adviser would have recommended him to declare, if any. As to this, there can, I conceive, be no doubt. His title to the Mesopotamia estate was under the will, and subject to the debts of his father, to which the charges created by the settlement in favour of the children were paramount; and though probably the amount of Mr. Joseph Foster Barham's assets rendered this liability of little or no importance or materiality, yet, considering the impossibility of certain knowledge by one man of the extent of debt or liability which another may have contracted, whether by suretyship, by covenants in leases, breaches of trust, or otherwise, and considering that the lunacy of Mr. John Barham, which continued to his death, had its commencement within less than six years from the decease of Mr. Joseph Foster Barham, such a condition of the title upon a question of presumed intention is not to be overlooked. A more

striking subject of observation in this view is probably, however, the nature of the different charges by which the Mesopotamia estate was affected, of their priorities, and of the rights in them. Under these considerations, having regard to the great uncertainty of the Mesopotamia estate being saleable for so much as the amount of the capital sums charged upon it, and to the interest that Mr. John Barham had in preserving a voice and common right with respect to the mode and time of enforcing payment of that which his property had to pay, it is impossible to say that he at any time stood indifferent upon the question of extinguishment, or that, up to the moment of his lunacy, it was not manifestly for his interest to prevent and deny the application of any such doctrine or notion. As to this part of the case, whether upon principle or upon authority. whether relying upon Forbes v. Moffat, or dealing with the matter as if Forbes v. Moffat had not existed, I have no doubt whatever.

It has, however, been argued, that Mr. John Barham's receipts, in his lifetime, were such as to have the effect of satisfying wholly, or to some extent, his portions of the charges to which I have been referring. No such effect can be ascribed to his possession of his father's assets, other than the property which the settlement charged with these sums, certainly; for the property so charged was the only fund applicable to their payment. As to his enjoyment of the property charged, that was in the character of owner, not in the character of incumbrancer or trustee. He might, probably, have been required by any of the incumbrancers to take possession as an incumbrancer, or to devote the rents and produce of the property, or allow them to be devoted, to the direct discharge of the incumbrances; but such a requisition was never made, and I am not prepared to say, that he either intended, or was placed in a position in which by contract or duty he was bound, to apply any portion of what he EARL OF CLARENDON 9. BARHAM. EARL OF CLARENDON BARNAM.

received from the property for crops or annual profits, towards the liquidation of his own, or any other incumbrance upon it. Mr. Lloyd has said, that in suits for the administration of the assets, real and personal, of deceased persons, where by law, or by their wills, the real estate is subject to debts, or to debts and legacies, it is the rule and constant practice of the Court, in the event of a deficiency of the personal estate and the corpus of the real estate, to charge the heir or devisee of it subject to the debts or debts and legacies, who, in that character, has been receiving the rents since the death of the testator or intestate, with those rents respectively, for the purpose of supplying the deficiency; and that on the ground of the trusts of the terms, of which John Barham had notice, or otherwise, a similar course ought to be pursued here. In the cases to which Mr. Lloyd refers, the rule and practice may or may not be as extensive and universal as he considers But however that may be, I am not prepared to say, that the same course is proper here, that the mode of dealing with assets, whether for payment of debts, or of debts and legacies, is applicable to a case such as this, or that the position of Mr. John Barham was not substantially that merely of a mortgagor in possession as owner, keeping down the interest of a mortgage, which he was not under a personal liability in respect either of interest or principal to pay. Upon the cases of Ex parte Wilson (a), Bertie v. Lord Abingdon (b), Gresley v. Adderley (c), Thomas v. Brigstocke (d), and other authorities of that class, as well as upon principle, it seems to me that I ought not, in favour of the incumbrancers on the Mesopotamia estate. to direct an account of the crops or annual profits of it received by John Barham. The counsel for the heir-atlaw have not, nor have the counsel for the younger

....

<sup>(</sup>a) 2 Ves. & B. 252.

<sup>(</sup>b) 3 Mer. 560.

<sup>(</sup>c) 1 Swanst. 573.

<sup>(</sup>d) 4 Russ. 64.

children, contended that Mr. Joseph Foster Barham's receipts from the Mesopotamia estate are, in the event of a deficiency, or otherwise, to be charged against his 10,000/., or otherwise against him, or accounted for by his assets. What I have said, I have not intended to apply to interest on the sums in question, in respect of any time previous to John Barham's death. The interest on all the charges created by the marriage settlement, as well as on the mortgages has, without prejudice to any other question, been agreed on all hands to be considered as claimable only from the decease of Joseph Foster Barham, and as having been, and so far, if at all, as now unsatisfied, being chargeable from that time to the decease of John Barham primarily on the personal estate of John Barham. Nor, in what I have said, have I intended to refer to the 10,000l., which belonged to Mr. Joseph Foster Barham, and was the first charge created by the settlement on the Mesopotamia estate. I apprehend, however, that with an exception to be presently mentioned, the grounds and reasons upon which in my judgment the capital of so much of the charges as Mr. John Barham was in his own right entitled to, must with interest from his death be considered, as I have said, to be wholly unsatisfied and unextinguished, apply at least as strongly and with the same effect to this sum of 10,000l., to say nothing of the mortgage to which it was subject, or of the duties belonging to his office of executor. The whole of the 10,000%, therefore, charged in Mr. Joseph Foster Barham's favour by the settlement, must be considered, I conceive, as having remained a subsisting charge at Mr. John Barham's death, subject to an exception already alluded to, which is this: If the compensation-money in respect of the Mesopotamia slaves, subjected with the estate to the charges created by the settlement, had been received by Mr. Joseph Foster Barham, it would, I think, as between his 10,000l. and the other of those charges.

EARL OF CLARENDON 9. BARRAM. EARL OF CLARENDON BARHAM.

have been incumbent on him to apply it in reduction of the capital of his 10,000l. It represented part of the corpus of the property charged. Received, as it was, by Mr. John Barham in the character of his father's devisee, it became not less, I conceive, subject to that obligation in the hands of Mr. John Barham, whom the same will constituted residuary legatee and executor, as well as devisee; and, I am of opinion, that the personal estate of Mr. Joseph Foster Barham, or of Mr. John Barham, must indemnify those who, under the settlement, are interested in the charges created by it, subsequently to the first 10,0001., from the interest of this sum up to the death of Mr. John Barham, (this having been agreed between the parties without prejudice), and as at the time of John Barham's death from a portion of the capital of it equal to the compensation-money that I have mentioned. I should here state, that the cause has been argued and treated before me on the assumption, that the personal estate of Joseph Foster Barham received by John Barham. was much more than sufficient for the payment of Joseph Foster Barham's funeral and testamentary expenses, and all his mortgage and other debts and legacies; and that John Barham died amply solvent as to his personal estate: all parties have so represented the matter to be.

It remains to consider the fortune of Lady Caroline Barham; the rights in which must, I think, be treated without any regard to the circumstance that part of it happens to be secured by a mortgage of the first 10,000*l*, and the other part by a mortgage on an estate of Mr. Joseph Foster Barham's, called the Island estate. The whole of her fortune was settled, and was borrowed from the trustees or trustee of it by Mr. Joseph Foster Barham, who became liable as a debtor to make good the whole of it. The trustees acquired in respect of it the general rights of creditors of Mr. Joseph Foster Barham, besides a lien on those portions of his property on which security for it

was taken from him. The debt was due to the trustees. and in them the securities were vested. There was no direct debt from him or his assets to the children, or any of them in this respect. For reasons and on grounds sufficiently appearing from what I have said, I conceive that the whole capital of this fortune of Lady Caroline Barham remained a subsisting debt from the assets of Mr. Joseph Foster Barham, at the death of Mr. John Barham, with regard to his own shares equally, and those of his brothers and sisters. It is true that he was in possession of the Island estate upon which a part of this fortune was secured by a mortgage, as the residue was secured by a mortgage of the 10,000l. But the character, intention, and circumstances of his possession, both of the Island estate and of the Mesopotamia estate were the same; and he neither was bound by contract or duty, nor intended, as I conceive, to apply any part of the crops or annual profits that he received towards liquidation of any part of the capital of the sums charged on either estate. With regard to the Island compensation-money, it was claimed and received by him as his father's devisee; and I think that he must be taken to have received it generally as part of his father's general assets, and that otherwise it was not intended or liable to be applied or ascribed by him, and did not become ascribed to any particular purpose or object. The plaintiffs have conceded that the deficiency, if any, of the Island mortgage security as it now stands, to make good the mortgage debt upon it, must be supplied by the personal estate of Mr. Joseph Foster Barham or of Mr. John Barham. I have not alluded to the purchase by Mr. John Barham of a part of the share of one of his brothers in a portion of the settlement funds. That share must be subject from the time of the purchase to the same considerations as Mr. John Barham's original share in the same funds. It has been suggested that part of the property subjected by the settlement to the charges created

EARL OF CLARENDON U. BARHAM. EARL OF CLARENDON BARHAM. by it on the Mesopotamia estate was of the nature of personalty, so as to render it necessary to apportion those charges between the different parts of the property liable. If so, this must be provided for.

I have, I think, only farther to consider whether the Island estate as it now stands is the prior or the secondary fund for the payment of the Island mortgage debt. To the discharge of an ordinary debt due from Mr. Joseph Foster Barham, his personal estate ought, I apprehend, in the ordinary course to be first applied. It has been contended, however, by the plaintiffs, that with regard to the sum secured on the Island estate this cannot be, and that to the payment of that sum the Island estate must primarily be applied. The first reason assigned for this is, that there is evidence in the cause shewing (as the plaintiffs insist) that, in point of fact, Mr. John Barham intended that as between the personalty and the mortgaged realty liable to this debt, the latter should be the prior fund to be applied. I am unable however to discover any such evidence. It is true, that in my opinion there was an absence of intention on his part that any part of the capital of his mother's fortune should be considered as either satisfied or extinguished. But this does not appear to me to amount to any thing for the present purpose. He could not as to the other persons interested in Lady Caroline's fortune, without their consent (a consent neither asked nor obtained, nor probably thought of), relieve any portion of his father's assets from the liability under which the whole of those assets was to make good that fortune, and I do not see any ground whatever for saying that he ever in fact indicated any wish or design that any one part should wholly or partially indemnify any other part of the assets in respect of it. The other assigned reason is, that, independently of any proof of actual intention, the united characters of acting executor and sole residuary legatee, as well as heir and devisee of his father, having rendered Mr.

John Barham solely and equally interested in the whole of the funds from which the fortune was due, it is a necessary consequence that the portion of those funds specifically pledged, though not exclusively liable for its payment, must bear the burthen of the pledge without indemnity or contribution. The necessity of such a consequence is not obvious to my apprehension. The general rule is. that a pledge or security for a debt, though having its full operation in favour of the creditor, does not take away the character of debt, and neither excludes him from any other remedy, nor changes or affects the mode in which as between those who take the debtor's property, subject to his debts, that property is to be applied. Generally, with regard to such a question, the case is dealt with as if the pledge or security did not exist. I do not forget the distinctions or exceptions established or recognised in Lutkins v. Leigh (a), Halliwell v. Tanner (b), Wythe v. Henniker (c), and the authorities to which reference is there made, distinctions or exceptions proving the rule, but otherwise seeming to me to have no place in the present case.

If the mere fact of the union of interests were material, it would have had its operation and effect, though Mr. John Barham had died within an hour of his father's death ignorant of it. In that case there might have arisen, and as matters are, there may arise, an absolute necessity for deciding which is the first fund for paying an unsecured specialty debt due from Mr. Joseph Foster Barham. Suppose such a creditor in existence: it would be contrary to all principle to hold that his caprice or election should decide between real estate now belonging to one person, and personal estate now belonging to another, which of the two is finally to bear the burden. The Court must decide in such a case. And on what ground could it be

EARL OF CLARENDON T. BARHAM.

<sup>(</sup>a) Ca. temp. Talb. 53. (b) 1 Russ. & M. 633. (c) 2 Myl. & K. 635.

EARL OF CLARENDON T. BARHAM. held, that the personal estate ought not, as between that and the real estate, to be first applied? What could have taken place in the event that I have supposed—what has, in fact, taken place, to change the ordinary course as to such an unsecured debt? In my opinion nothing. If so, in the absence of proof of actual intention, why should the mortgage or pledge make any difference? Yet, if the plaintiffs' contention is right, they would in the event of the mortgagees recovering, as it is admitted that they are entitled to recover, their debt against the general personal estate of Joseph Foster Barham, be entitled to stand in the mortgagee's place against, or be indemnified by the The foundation of such a state of things Island estate. in principle I am unable to see. Agreeing entirely with the doctrine laid down in Bagot v. Oughton(a), and Evelyn v. Evelyn (b), which has been recognised in many other cases, (particularly one in this family, Barham v. Lord Thanet (c)), I do not see any clear and irresistible reason for not holding that an executor, who being also sole residuary legatee, has received more personal estate than enough to pay all the funeral and testamentary expenses, and debts and liabilities of every description, as well as legacies, becomes himself substantially debtor to the creditors of the testator. And whether such an executor is sole executor or survived by a co-executor, I apprehend that the doctrine of Lord Chief Baron Gilbert, Lex Præt. 315, equally applies in principle. The case also of Lord Belvedere v. Rochfort (d), in the House of Lords, (though I am aware of what Lord Thurlow has in Tweddell v. Tweddell (e), and Lord Alvanley in Woods v. Huntingford (f), said of that case), may be thought to have at least a considerable bearing the same way, and consequently against the plaintiffs. Lord Thurlow, who, as leading counsel, signed the case for the suc-

<sup>(</sup>a) 1 P. W. 347.

<sup>(</sup>b) 2 P. W. 659.

<sup>(</sup>c) 3 M. & K. 607.

<sup>(</sup>d) 5 Bro. P.C. 299.

<sup>(</sup>e) 2 Bro. C. C. 101.

<sup>(</sup>f) 3 Ves. 130.

1842.

EARL OF

CLARENDON

BARHAM.

cessful party, the respondent in Lord Belvedere v. Rochfort, appears to have considered that the House of Lords held, but ought not to have held, that the mortgage debt in question there had been made the debt of Robert Rochfort, the grandfather, as between his real and his personal estate; and he is reported as having said, "In that case George had a fee-simple in the estate, he was capable of giving it after the charges were extinguished." But I am not at all persuaded that he dissented from the doctrine to be found in Gilbert, and upon which doctrine, the printed cases in Lord Belvedere v. Rochfort, and the statements of Lord Thurlow and Lord Alvanley, in Tweddell v. Tweddell and Woods v. Huntingford, shew, if not the certainty, at least a very high degree of probability, that in Lord Belvedere's case, both Lord Lifford and the House of Lords meant to act and did act independently of Lord Jocelyn's decree, and not by reason or in consequence of what Lord Jocelyn had done. Nor can I see that Perkyns v. Bayntun (a), as to which I have examined the Registrar's book, is at variance with this doctrine. In Perkuns v. Bayntun no account was sought of the personal estate of Sir William Osbaldistone, who had died a quarter of a century before the suit. What was its amount, whether it was considerable or inconsiderable, whether as to his personal estate in fact he died solvent or insolvent, was not stated, and does not appear. The point in Gilbert seems not to have been raised or touched in that case. Upon the whole, thinking the opinion of Lord Chief Baron Gilbert well founded in principle and corroborated, if touched, by Lord Belvedere's case, I should, had the cases of Scott v. Beecher (b), Evans v. Smithson (c) and Lord Rchester v. Lord Carnarvon (d) not existed, have held and decided that the personal estate of Joseph Foster Barham, and there-

(a) 2 P. W. 664, n.

<sup>(</sup>c) Not reported.

<sup>(</sup>b) 5 Madd. 96.

<sup>(</sup>d) 1 Beav. 209.

VOL. I.

EARL OF CLARENDON T. BARHAM. fore in substance the personal estate of John Barham, is the first fund for the payment of the mortgage on the Island estate. Consistently, however, with the opinions which appear to have been expressed judicially by Sir John Leach, Lord Lyndhurst, and Lord Langdale in these three cases, I apprehend that I cannot so decide. Feeling the respect due from me to these authorities, independently of Lord Lundhurst's present position, deferring to them, and not upon this point acting in accordance with my own opinion, I direct the insertion in the decree of a declaration, that the Island estate is the first fund for the payment of the Island mortgage. The property which I have called the Island estate, subjected to this mortgage for 10,773l. 6s. 2d., may possibly not be wholly real estate. It may include some personalty—a remark which I do not mean as extending to the Island compensation-money, which, as I have said, I cannot hold to have been or to be ascribed, or applied, or applicable, otherwise than merely as part of the general mass of the general assets of Joseph Foster Barham, or general personal estate of John Barham, this being, as it seems to me, a consequence of the manner in which and expressed title under which he received it, and of his conduct in all respects. His father had nothing more than a life interest in the benefit of the Island mortgage. Before concluding I may observe, that the reference which I have made to Evans v. Smithson has been occasioned by my entire reliance upon the authenticity of the information from which Mr. Tinney's statement of that case was made, and my supposition that Lord Lyndhurst's view of the law, as to a vendor's lien, agreed with that of Sir W. Grant in Trimmer v. Baune (a). and of Sir L. Shadwell in Sproule v. Prior (b). that the passage in Gilbert was brought under his Lordship's notice, but not Lord Belvedere's case, and that neither was cited before Sir J. Lench or the present Master of the Rolls.

EARL OF CLARENDON 5. BARHAM.

The minutes, so far as they can be conveniently at present dictated, ought, I suppose, consistently with what I have stated, to be thus:—

DECLARE, that the trusts of the marriage settlement of Joseph Foster Barham and Lady Caroline his wife ought to be carried into execution: Declare, that the slave compensation-money received by John Barham under the order of the West India compensation commissioners, in respect of slaves comprised in or subject to the terms of 500 years and 1000 years created by the marriage settlement, ought to have been by the said John Barham paid to the mortgagees to whom the sum of £10,000, which was the first charge created by the marriage settlement, was appointed or assigned by way of mortgage, in discharge pro tanto of the capital of such sum of £10,000, and in exoneration so far of the said terms: Declare, that the assets of John Barham became upon his decease, and are now liable to effectuate and make good such discharge and exoneration as to so much of the said £10,000 from the time when he received the said compensation-money. Let the master ascertain the amount of the compensation-money received by the said John Barham in respect of the slaves comprised in or subject to the said terms: And the plaintiffs and all other parties being willing, and the plaintiff Lord Clarendon and all other parties sui juris by their counsel consenting, without prejudice to any other question: Declare, that the personal estate of the said John Barham ought to be considered and treated as primarily liable to pay and discharge all interest up to his death, upon or in respect of the several capital sums which were made raisable by the trusts of the said terms, and upon or in respect of the several mortgages and mortgage charges created by John Foster Barham as in the pleadings mentioned, so far as any such interest, up to the said John Barham's death, was not satisfied before his death, or has not since his death been satisfied out of his personal estate. Declare, that the union of rights and interests in the real and personal estates of Joseph Foster Barham, which took place after his death, in the said John Barham, as in the pleadings mentioned, had not, under the circumstances, the effect of merging or extinguishing, and that the said John Barham was not bound, and did not intend, to merge or extinguish, or allow to be merged or extinguished, the several capital sums made raisable by the said marriage settlement, and the capital sums secured by the said mortgages respectively, or any or either of them, or any part thereof, and that subject as aforesaid, all the several capital sums continued to be and were raisable and subsisting charges at his death, and that, subject as aforesaid, his personal estate was at his

EARL OF CLARENDON 7. BABHAM. decease, and now is, entitled to the benefit of his portions of the said several capital sums and charges: Declare the Island estate, exclusive of the Island compensation-money, to be the primary fund, and the general personal estate of Joseph Foster Barham and John Barham, the secondary fund for discharging the mortgage upon the Island estate, except as to interest, previous to John Barham's decease, but without prejudice to any question of apportionment between real estate and personal estate, if any, other than the Island compensation-money, which at the decease of John Barham was comprised in the Island mortgage. And refer it to the Master to inquire what is real and what is personal estate in regard to the Mesopotamia and Island estates respectively, &c.

June 30th.

Form of inquiry in a bill of fore-

closure, where the defendant suggests by his answer that the plaintiff has been in possession and paid himself interest.

### DOBSON v. LEE.

L'HIS was a common foreclosure suit. The defendant, by his answer, stated that the plaintiff had entered into possession and receipt of the rents and profits of the mortgaged estate, and had, as he believed, received more than sufficient to pay the interest of the mortgage.

THE VICE-CHANCELLOB said that the question, whether the mortgagee had been in possession or not, was incidental to the account; and that though it was entirely in the discretion of the Court to grant an enquiry as to that fact, it was usual to do so upon the suggestion contained in the answer.

Take the usual decree for an account and foreclosure as against a mortgagee not in possession; and let the Master enquire whether the plaintiff is or has been in possession of the rents and profits of the estate, or any part of it, as mortgagee in possession; and if the Master shall find in the affirmative, let him take an account as against a mortgagee in possession, including wilful default.

1842.

July 5th.

### WHITMARSH v. ROBERTSON.

ON the marriage of Mr. and Mrs. Finlayson, in 1820, a Trustees who sum of £1757 Consols, the property of the wife, was assigned to trustees upon trust, during the joint lives of the husband and wife, to pay the dividends to the wife for her of an alleged separate use, and after the death of either to pay the dividends to the survivor during his or her life, for his or her own benefit; and after the decease of the survivor upon trust to pay and divide the capital stock amongst the and client, alchildren of the marriage in equal shares; such shares to be vested in the sons upon their attaining twenty-one, and in the daughters upon their attaining twenty-one or marrying. And power was given to the trustees, at any time cumstances of or times after the decease of the survivor of the husband and wife, or in the lifetime of the husband and wife, or the survivor of them, with their, his, or her consent in writing, to raise any part or parts (not exceeding one moiety) of the expectant portions of the children, notwithstanding the same should not have become vested or payable, and apply the same for the preferment or advancement of such children.

There were seven children of the marriage. In January, 1837, the husband died; and shortly afterwards the right of conwidow married William Mileham. Upon the second marriage no settlement was executed.

By an indenture dated the 4th April, 1837, Mileham and wife assigned all the life interest of Mrs. Mileham in the trust fund to the plaintiff as an absolute purchaser, in life interest? consideration, as stated in the deed, of £550.

Notice of this assignment being given to the trustees of the settlement, they, at the request of Mrs. Mileham, paid one dividend to the plaintiff. It appearing, however,

had declined to transfer a fund to an assignee fraud in the assignment, were held entitled to their costs as between solicitor though the assignment was decreed to be carried into execution; there being some cirsuspicion attending the assignment, particularly a variance between the consideration expressed in the deed and the actual consider-

Quære, whether a person having a life interest in a fund, with a senting to the advancement of children out of the capital, destroys the power of advancement by assigning the

Quære, whether the assignment by a husband of the dividends of a fund to which his wife is entitled for her life, carries the

dividends which may accrue in her lifetime after his decease?

WHITMARSH U. ROBERTSON.

afterwards, that the full consideration stated by the deed had not been paid by the plaintiff in cash, and it being alleged that a part of it had been withheld by fraud, and there being also, as the trustees were advised, legal objections to the payment of the dividends to the plaintiff, they refused to make that payment. The plaintiff then, for the purpose of enforcing his security, filed the present bill against the trustees, Mr. and Mrs. Mileham, and the infants; whereupon the trustees paid the dividends into Court.

Immediately before the answer of Mr. and Mrs. Mileham was put in, Mrs. Mileham sent a letter to the trustees requesting them to make an advance of part of the fund for the benefit of the children; but neither the amount nor the specific object of the advance was mentioned.

The answer of Mr. and Mrs. Mileham stated various acts of fraud on the part of the plaintiff, in the transaction between him and them; but the evidence of the plaintiff, in a great measure, explained those acts.

The principal question discussed at the hearing was, whether the trustees should be allowed their costs out of the fund in Court.

Mr. Russell, and Mr. Stinton, for the plaintiff.

Mr. Wigram, for the defendants, Mr. and Mrs. Mileham.

Mr. Welford, for the defendants, the infants.

Mr. James Parker, for the trustees.—The trustees were justified in refusing to pay the dividends: for, 1st, The circumstances attending the assignment were suspicious. 2ndly, It is uncertain for what period they could pay the dividends, because it is doubtful whether the husband's assignment carries the wife's reversionary interest in the

event of her surviving him. In Stiffe v. Everett (a) Lord Cottenham said, that there was an absence of authority on this point. 3dly, It is questionable whether, notwithstanding the assignment, the children had not an interest under the power of advancement. 4thly, Notwithstanding the cases of Elliot v. Cordell (b) and Stanton v. Hall (c), it might be contended, that the wife was entitled to a settlement out of the life interest. These questions, or some of them, were too nice for the trustees to decide.

1842.
WHITMARSH

T.
ROBERTSON.

Mr. Russell, in reply, contended, that the first and last points were clearly in favour of the plaintiff. Upon the second point, he insisted that the plaintiff could not be in a worse situation than if Mrs. Mileham had assigned before coverture; and upon the third point he cited Noel v. Lord Henley (d), and observed, that notwithstanding Mr. Preston's opinion to the contrary, it had long been settled, that a power to advance children was not in the nature of a trust.

THE VICE-CHANCELLOR said, that considering the frame of the pleadings, and the discrepancy between the consideration stated and acknowleged in the deed, from the consideration, whatever it was, which really did pass, it was not surprising that the instrument should have been matter of question and suspicion to the trustees. He was of opinion, therefore, that the trustees were entitled to their costs, as between solicitor and client, up to the present time out of the wife's life interest. His Honor then, after deciding for reasons which he stated, that there should be no costs as between the plaintiff and Mr. and Mrs. Mileham, observed that the question, whether the power to advance the children was affected by the assignment, was open to

<sup>(</sup>a) 1 M. & C. 37.

<sup>(</sup>c) 2 Russ. & M. 175.

<sup>(</sup>b) 5 Madd. 149.

<sup>(</sup>d) M'Clel. & Y. 302.

1842. V H ITM ARSH ROBERTSON. considerable argument; nothing, however, had been done at present to raise the question, as the paper which had been proved in the cause was much too vague in its terms to be acted upon. As to the question whether Mrs. Mileham surviving her husband, would or would not be entitled to receive the annuity, his Honor declined to give any opinion.

THE decree contained a declaration that it should be without prejudice to any question as to the right of the plaintiff to the dividends after Mr. Mileham's death, if he should die in his wife's lifetime; and without prejudice to any question as to the power contained in the settlement for raising any part or parts of the portion or portions to be raised for the children therein mentioned, for the advancement or benefit of such child or children, or the execution or exercise thereof.

July 22nd, 29th.

By a voluntary settlement, personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike. if more than one, and if only one, the whole

### LANG v. PUGH.

BY an indenture bearing date the 5th August, 1822, and made between Ross Lang, a major-general in the service of the Honourable East India Company, of the one part, and three persons, named Gordon, Dare, and Richardson, of the other part, after reciting that Ross Lang had deposited in the hands of the parties of the second part the sum of 15,000 pagodas, upon the trusts thereinafter mentioned, it was witnessed that the deposit was so made in trust to invest the said pagodas in securities in India, and to apply the interest towards the maintenance, sup-

to be paid to such only child; or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them, as aforesaid, on their attaining twenty-one, if sons, or if daughters, on their marriage, respectively. By his will, the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the funds in question, either on her attaining twenty-one, or on her marriage under that age.

Upon the particular wording of a will, the Court considered it doubtful whether personal property did not vest immediately in a legatee, although the gift was contained only in the direction to pay at twenty-one or marriage, and there was no disposition of the income during minority.

port, and education of Frank, Philip, Rebecca, and Clarissa Slanev, and John Lopez, the reputed children of the settlor, until the said Frank and Philip Slaney, and John Lopez, or either of them, should attain the age of 21 years, and Rebecca and Clarissa Slanev should attain their respective ages of 20 years, or marry after the age of sixteen; at which respective periods the fund was directed to be paid and transferred to those parties in equal shares; and, in case the said Frank Slaney, Philip Slaney, and John Lopez, or any or either of them, should depart this life before they or either of them should attain their respective ages of 21 years, or the said Rebecca Slaney and Clarissa Slaney, or either of them, should also depart this life before they or either of them should attain their respective ages of 20 years, or be married after respectively attaining their sixteenth year, whichever might first happen, then in trust to pay the interest to accrue and grow due upon the respective share or shares of the said party or parties so dying, to and for the sole use and benefit of Thomas Pelling Lang, the son of the said Ross Lang, during his natural life, and on his decease to pay the principal amount of such share or shares to the lawful issue of the said Thomas Pelling Lang, if then of age, or married, share and share alike, if more than one, and if only one, the whole of the principal amount of the share or shares of the party or parties so dying, as aforesaid, to go and be paid to such only child; or, in case such child or children of the said Thomas Pelling Lang should be an infant or infants on the death of the said Thomas Pelling Lang, then, that the said principal amount of the share or shares of the party or parties so dying as aforesaid, should be divided or paid to him, her, or them, as aforesaid, on their attaining their respective age or ages of 21 years, if sons, or if daughters, on their marriage respectively.

The indenture then contained a further trust of the 15,000 pagodas in favour of Kenneth Ross M'Kenzie and

LANG v. Pugh. LANG v. Pugh. his brothers and sisters, in case Thomas Pelling Lang should "die without having had any issue lawfully begotten;" and likewise certain provisions, in case the Slaneys and John Lopez, or any of them, should die in the lifetime of the settlor, before they should be entitled to receive their shares. There was likewise a proviso that the deed should be revocable by the deed or will of the settlor.

General Lang, by his will, dated the 3rd August, 1822, directed Gordon, Dare, and Richardson, the same persons as were trustees under the deed, to invest the sum of 4000 pagodas in East India securities in their names, and to hold the same upon trust to pay the interest and dividends to accrue due thereon to Mrs. Ann Burnside, widow, for her sole and separate use during her life, and after her decease, in trust to pay and apply the interest, dividends, and annual produce to accrue due thereon, to and for the sole use and benefit of his son, Thomas Pelling Lang, during his natural life; and on his decease to pay the said principal sum of 4000 pagodas to the lawful issue of his said son, if then of age or married, share and share alike if more than one; and if only one, the whole of the said principal sum to go and be paid to such only child; or in case such child or children of his said son should be an infant, or infants on the death of the said Thomas Pelling Lang, then that the said principal sum should be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of 21 years, if sons, or if daughters, on their marriage, respectively. And as to the rest, residue, and remainder of his estates, and effects whatsoever, whether real or personal, not thereinbefore specifically bequeathed and disposed of, subject to and after the payment of all his just debts, funeral expenses, and the charges of proving his will, the testator thereby devised, bequeathed, and disposed of the same to his said son, Thomas Pelling Lang, his executors, administrators, and assigns; and he thereby constituted and appointed his

said son, Thomas Pelling Lang, Gordon, Dare, Richardson, and Kenneth Ross Mackenzie, his executors.

LANG PUGH.

The deed of the 5th August, 1822, was never revoked. In September, 1822, General Lang died, and soon afterwards his will was proved by all the executors, except Kenneth Ross Mackenzie who never acted.

All the donees of the 15,000 pagodas under the deed, except John Lopez, became entitled to receive and received their shares of that gift. Upon the death of John Lopez in his infancy, Thomas Pelling Lang received the interest of 3000 pagodas, his share of the 15,000 pagodas, and also, upon the death of Mrs. Burnside, received the interest of the 4000 pagodas comprised in the will. Thomas Pelling Lang died in November, 1838, leaving the plaintiff, an infant daughter, his only surviving child.

The bill was filed against the executors of Dare, the surviving trustee under the deed and will, and against the executors of Thomas Pelling Lang; and it prayed that the trusts of the indenture of the 5th August, 1822, and of the will, as related to the 3000 pagodas and 4000 pagodas, might be carried into execution, and the rights of all parties in the said sums, and the interest therein, since T. P. Lang's death might be declared, and the share or interest of the plaintiff secured for her benefit.

Mr. Russell, and Mr. A. Gordon, for the plaintiff, contended that either the children of T. P. Lang took a vested interest, or the daughters took an interest, which would vest at twenty-one or marriage: Booth v. Booth (a), Davies v. Fisher (b). [The Vice-Chancellor referred to Hunter v. Judd (c)].

Mr. James Parker, for the defendants, the executors of T. P. Lang.—Where the only gift to a person or class consists in a direction to pay or divide at a particular time,

<sup>(</sup>a) 4 Ves. 399. (b) 6 Jurist, 248. (c) 4 Sim. 455.

1842. LANG PUGH.

nothing vests till the time specified. A direction to pay is contingent unless there are strong words to control that construction: Leake v. Robinson (a), Hanson v. Graham (b), Billingsley v. Wills (c), Steadman v. Paulin (d), Batsford v. Kebbell (e), Sansbury v. Read (f), Murray v. Tancred (g). Then as nothing vests here till the time of payment. and as the time of payment, with respect to this plaintiff, is her marriage, it follows, that as she was not in esse at the time of the testator's death, the gift to her is void for remoteness.

Mr. Temple, and Mr. Heath, for the trustees.

Mr. Russell, in reply.

THE VICE-CHANCELLOB.—This case turns upon the con-July 29th. struction to be put upon certain provisions contained in the will of General Lang, and a deed executed by him under which the plaintiff claims. These instruments, so far as it is necessary for the present purpose to state them, are to this effect. [His Honor here read the in-

struments.

The facts admitted are, that General Lang died in the year 1822, and was survived by all the persons named in these instruments; that his son, Thomas Pelling Lang, was then a bachelor, but afterwards married, and had four children only. Of these, one is the plaintiff, who has survived her father. The other three died in his lifetime, minors, neither of them having ever married. They are not represented in this cause; nor is Kenneth Ross Mackenzie, or any brother or sister of his, a party to the suit. No objection has, however, been taken for want

<sup>(</sup>a) 2 Mer. 364.

<sup>(</sup>e) 3 Ves. 363.

<sup>(</sup>b) 6 Ves. 249.

<sup>(</sup>f) 12 Ves. 75.

<sup>(</sup>c) 3 Atk. 219.

<sup>(</sup>g) 10 Sim. 465.

<sup>(</sup>d) Id. 423.

of parties, and the counsel for the plaintiff and defendants have expressed a wish that, as far as possible, the Court should, in the present stage of the cause, declare the construction of the instruments upon the point or points in dispute.

LANG

The executors of General Lang, the trustees of the funds in question, and the executors of General Lang's residuary legatee, are before the Court. Mrs. Burnside and John Lopez died in the lifetime of Thomas Pelling Lang. John Lopez died a minor. The plaintiff claims the absolute interest, or, at least, a contingent interest in the whole, or an absolute interest in a part of the respective funds, of which Mrs. Burnside was tenant for life, and to which John Lopez, if he had attained majority, would have been entitled.

These claims are wholly resisted by the defendants, or some of them, who contend, that the plaintiff has no interest whatever; and that, therefore, the bill ought to be dismissed: founding themselves upon this, that the dispositions in her favour are, as they contend, invalid. They insist that these dispositions are wholly contingent on her marriage; and that, as she did not come into existence until after General Lang's death, and her marriage might not and may not take place, until more than twenty-one years after that event, they are, therefore, illegal. The first question then is, whether the dispositions in her favour are merely contingent on her marriage. The construction for which these defendants contend does not, certainly, sound very acceptably, since it ascribes to the author of the instruments an intention which, while it is of an unusual description generally, even where the law allows it, and is of a nature especially improbable in the particular case, frustrates the dispositions themselves by infringing the law. An intention of such a kind is not readily to be imputed in the case of a will or deed worded obscurely, inaccurately, and in such LANG v. Pugh.

a manner, as that, with regard to some of its provisions, a departure in interpretation from the correct and ordinary meaning of language is certainly and confessedly requisite. That the deed and will before me are liable to be so described, it is, I think, impossible to deny. "issue," at the outset of the dispositions in question, must, it is conceded, on all hands, be held to mean "child" or "children." The words, "to the lawful issue of the said Thomas Pelling Lang, if then of age or married," must, I apprehend, be read as meaning, "to such of the children of the said Thomas Pelling Lang as shall then be of age or married." The words "or in case such child or children," must mean, "and in case any such child or children." And again, the expression, "an infant or infants," if taken literally, would include the case of a daughter of Thomas Pelling Lang, married in his lifetime, but a minor at his death, to whom the donor had before directed the fund, or a share of it, to be paid. I have applied the term improbable to the intention ascribed by the defendants to General Lang, because it supposes him to have meant any daughter of Thomas Pelling Lang surviving her father, and having attained majority in her father's lifetime to take the fund or a portion of it absolutely, though never married, but to have meant altogether to exclude any daughter, a minor, at her father's death if not then married, unless she should at some period of her life marry; which I certainly think very unlikely. If my observations thus far are well founded, the construction for which the defendants contend is one to be avoided, if reasonably, and without infringing any established rule it can be-one not to be adopted by a Court, unless compelled by an irresistible demonstration of intention.

Now, in the first place, it may, perhaps, be reasonably doubted, whether there is any contingency at all—that is, notwithstanding the absence, if there be absence, of any gift to the children, except in the direction to pay—not-

withstanding the absence of any disposition or provision as to the income during minority—whether the true view of each instrument ex omni considerata scriptura (especially having regard to the expression "in case the said Thomas Pelling Lang shall die without having had any issue," which precedes the gift to Kenneth Ross Mackenzie) is not that both funds (subject to the preceding interests) became absolutely vested in the four children on their births respectively, or in the plaintiff alone on the death of Thomas Pelling Lang.

Without, however, at present deciding, I will for the immediate purpose assume, that nothing has yet vested in the plaintiff, or in either of the deceased children of her father. The question then is, what does the expression "or if daughters on their marriage respectively" mean? If by "marriage" as here used, the author of the instruments intended only marriage in minority, then remoteness and consequently illegality is out of the question. Now, in both instruments, wherever this word occurs elsewhere, wherever an allusion is made to marriage elsewhere (for both the word and allusion do occur several times elsewhere with reference as well to his grandchildren as to other persons). the word is used as meaning, and the allusion is made to. marriage in minority, uniformly, with the single exception of a reference to the possibility of a future marriage of Mrs. Burnside, who was a widow, and probably above twentyone years old at the date of the will. This observation is alone, it must be agreed, far from decisive, but in conjunction with the improbability on other grounds that General Lang should have intended the word to bear any other sense in the passage under consideration, and with the unusual character which any other sense would give to his dispositions, has, I think, considerable weight. Bearing in mind that for the reasons which I have stated, unless I am mistaken, these instruments ought assuredly to receive that kind of construction which has been called "benigna interLANG v. Pugh. LANG v. Pugh. pretatio," I think, referring to the remarks already made, that the word "marriage" in the passage immediately before us ought to be construed "marriage in minority." But it may be then said, that the case of a daughter attaining twenty-one after her father's death and before marriage is not provided for. I am, however, of opinion, that by implication at least, it is provided for, and that (ex omni considerate scripture as I said before) the true meaning of the words "on their attaining their respective age or ages of twenty-one years, if sons, or, if daughters, on their marriage respectively," is "at the age of twenty-one years, or in the case of daughters marrying earlier, upon marriage." It follows that I think the dispositions in favour of the child or children of Thomas Pelling Lang valid whether contingent or not contingent.

The deceased children not being represented in the cause, I cannot now bind their rights, if any. My opinion, however, having regard to Billingsley v. Wills (a), and other authorities of that class, is, that upon the true construction of the deed and will, neither of them did acquire any interest. They all died in the lifetime of Thomas Pelling Lang, neither of them attained majority, and neither of them married. I state my impression upon this point with the less reluctance, because, in all probability, the personal estate, if any, of those children must be substantially the personal estate of their father, whose executors are before the Court. I do not now decide or express any opinion whether the words, "Thomas Pelling Lang shall die without having had any issue lawfully begotten," are to be construed literally, or as meaning "Thomas Pelling Lang shall not have any child that shall attain twenty-one, or being a daughter shall marry," that is to say, whether in truth Kenneth Ross Mackenzie and his brothers and sisters, if any, have or have not a possible interest. What I can, and do decide

is, that the plaintiff, if not absolutely entitled to the whole or one-fourth of the funds in question, is entitled to the whole of them contingently, upon her attaining majority or marrying in minority. The bill, therefore, cannot be dismissed; the plaintiff must have some relief. It may be as well to mention that, in considering this cause, I have, besides the cases cited in the argument, and some of those cited in Davies v. Fisher, referred to East v. Cook (a); Boon v. Cornforth (b), Dodson v. Hay (c), Whitmore v. Trelawney (d). I have read also with attention the valuable judgment of Sir Edward Sugden in a case of Vize v. Stoney (e), recently decided by his Lordship in Ireland.

1842. LANG Pugn.

- (a) 2 Vez. Sen. 30.
- (d) 6 Ves. J. 129,

(b) Ibid. 277.

- (e) 1 Dr. & War. 337.
- (c) 3 Bro. C. C. 404.

## TAYLOR v. TAYLOR.

THOMAS HOWELL, by his will, devised to his wife Upon the con-Sarah Howell a certain messuage wherein Joseph Merrett dwelt, with the appurtenances, situate in the parish of Awre, in the county of Gloucester, to hold to his said wife bound to elect and her assigns during her life, provided she should so benefits given long continue his widow; and from and after her decease or second marriage, the testator devised the same premises in part of the to John Taylor and Thomas Howell, whom he appointed trustees and executors of his will, upon trust for the maintenance of the child with whom his said wife might be then pregnant, until he or she should attain twenty-one years of age, and from and immediately after that event, the testator devised the same premises unto and to the use of such child his or her heirs and assigns for ever; and if such child should happen to die before attaining the age of twenty-one years, then to such persons and for such

July 13th.

struction of a will, held, that the widow of a testator was between the her by the will, and free-bench devised estates.

TAYLOR b.
TAYLOR.

estates as in the will mentioned. And the testator devised all the residue and remainder of his messuages, lands, tenements, hereditaments, and premises of which he was then seised or possessed, in the county of Gloucester, unto the said John Taylor and Thomas Howell, upon trust, to let, set, and manage the same, and take the rents and profits, and pay the yearly sum of £30 to his said wife, halfyearly, if she should continue his widow, but not otherwise, until his son, the said Thomas Howell, should attain his age of twenty-two years; and from and immediately after that event, the testator devised unto the said Sarah Howell, in case she should be living and his widow, all those pieces or parcels of land called Flower's Leaze, Ox Leaze, and the Warth, situate and being in the parish of Awre aforesaid, to hold the same, with the appurtenances, unto the said Sarah Howell and her assigns for her life. or until her second marriage; and from and immediately after her decease or second marriage, he gave and devised the said land called Flower's Leaze, to Frances Howell. his daughter by a former wife, her heirs and assigns for ever, on her attaining the age of twenty-one years; but in case she should happen to die before she should become possessed of or entitled to said land called Flower's Leaze, without leaving lawful issue of her body her surviving, then the testator gave and devised such land unto and between all and every the others and other his children and child, by his former wife, his, her, and their heirs and assigns for ever. Then followed similar devises of Oxleaze and the Warth, to two other daughters of the testator respectively. And the testator devised unto his son Walter Howell, from and after his said son Thomas should attain his age of twenty-two years, all that his messuage and garden, with the appurtenances. situate in the village of Blakeney in the said parish of Awre, &c., then in the occupation of Mr. Jones; to hold the same unto the said Walter Howell, his heirs

and assigns for ever. And the testator devised unto his son, the said Thomas Howell, on his attaining the age of twenty-two years, divers messuages and hereditaments in the said parish of Awre, all of which were specified in the will, to hold to him, his heirs and assigns for ever. And the testator devised unto his daughter, Mary Howell, all those his two meadows or pasture grounds called Dow Meadows, containing &c., then in the occupation of George Baker, and all that piece of arable land called Twopenny Patch, containing &c., which said two last-mentioned meadows or pasture grounds and piece of arable land, were situate in the parish of Awre, to hold the same unto his said daughter Mary, her heirs and assigns for ever; and in case his said daughter should happen to die before she should become possessed of or entitled to said meadows or pasture ground and arable land, without leaving lawful issue, then the testator gave and devised the same to such persons and for such estates as in his will mentioned.

The testator died leaving the several persons named in his will surviving him. Thomas Howell attained the age of twenty-two years, in or about March 1841.

The present suit having been instituted by the creditors of the testator for the administration of his estate, the Master was, amongst other things, directed to inquire, whether Sarah Howell, the testator's widow, who was a defendant, was or would, but for the devises in the testator's will, be entitled to dower or free-bench out of any and what part of the testator's real estates. The Master found that Sarah Howell claimed to be entitled to free-bench in the pieces or parcels of land called Dow Meadows, which were copyhold of inheritance held under the mayor and burgesses of the city of Gloucester; and that by the custom of the said manor, the widow of any tenant dying seised of any land within the manor is entitled to free-bench, or an estate during her widowhood, in the whole of such lands and premises.

TAYLOR TAYLOR.

TAYLOR 7.
TAYLOR.

The cause now coming on to be heard for further directions—

Mr. Wilbraham and Mr. Hall, for the devisee of the Dow Meadows, cited Hall v. Hill (a) and Roadley v. Dixon (b).

Mr. F. Bayley, for the widow.—The widow takes an interest in the entirety of the estate during widowhood by free-bench. Her doing so is not more inconsistent with the devise to Mary after her brother's attaining twentytwo, than the claim of dower is inconsistent with a devise to a third person of the estate out of which the dower arises. The presumption is, that the testator intended to dispose of no more than what was his-namely, the estate subject to free-bench. The annuity of £30 payable to her out of the estate, until the son attains twenty-two, is not sufficient to put the widow to her election: Hall v. Hill. In Roadley v. Dixon there was a direction to manage a particular farm, which constituted the principal part of an estate "now in my possession," and the widow claimed dower The management of the farm was considered inconsistent with her claim to set it out by metes and bounds. Hall v. Hill was in a great measure decided on the ground of the power of leasing, which applied to the whole property. [The Vice-Chancellor.-In the present case, the Dow Meadows are described as being in the occupation of George Baker.] In Miall v. Brain (c). Sir John Leach considered the claim of dower to be necessarily excluded, by the gift of a house for the personal occupation and enjoyment of the testator's daughter. Butcher v. Kemp (d) was decided on like considerations. The present case is distinguishable from those which have been referred to.

& Law. 120.

<sup>(</sup>a) 1 Dr. & War. 94; 1 Con.

<sup>(</sup>c) 4 Madd. 119.

<sup>(</sup>b) 3 Russ. 192.

<sup>(</sup>d) 5 Madd. 61; see Reynard v.

Spence, 4 Beav. 103.

Mr. Wilbraham, in reply.

TAYLOR
TAYLOR

THE VICE-CHANCELLOR.—The question is, whether upon the face of the will it appears, that the testator, in making the will, was under an impression that this land at Awre would, at the time of his son Thomas attaining twenty-two, be enjoyed by some person other than the widow; without considering whether she would or would not be entitled to free-bench out of it. If you find that he made his will under that notion, then it is a case of election. Now, I think you can.

It would be unsafe to look at any particular clause in the will as alone indicating that impression, but looking at the general disposition of the property-looking at the general expression of his intention, that the shares into which he distributed this farm should be in the immediate enjoyment of the several persons to whom they were devised, when his son should attain twenty-two, (a point which he appears to insist upon throughout the whole will), and when you see, that in using the expression "possessed of or entitled," he makes no distinction between the Dow Meadows and the other lands in Awretaking all these circumstances together, I think it may be collected, that it was the testator's intention that the Dow Meadows should, when the son attained twenty-two, be the subject of immediate enjoyment by some other person than the widow, though the widow might be living and unmarried. I am of opinion, therefore, that the widow must elect.

SHAW P. SIMPSON.

1842. July 25th, 26th.

The consignee of a West India estate, who had, out of his own monies. on account of an annuity charged on the estate, was held entitled to be reimbursed such payments out of compensation money which had been awarded under the act for the abolition of

slavery. Quære, whether such a consignee has a lien on the corpus of the estate for monies expended by him in its cultivation?

BY an order made in this cause, certain estates in the island of Jamaica called Non-Such and Unity, were directed to be sold for the payment of certain legacies. These made payments estates were subject to an annuity of £1000, payable to Selina, the wife of W. H. Weaver, for her life.

The estates having been sold to a person who afterwards became bankrupt, they were, by an order of August, 1824, made in this cause and also in the bankruptcy. ordered to be resold; and it was further ordered, that the purchase-monies, after providing for costs, should be paid to Alexander Grant, as executor of Donaldson, who was an incumbrancer on the estate to a large amount, subject to Mrs. Weaver's annuity.

By the order for the resale, Grant, who had been previously appointed by the Court of Chancery consignee of the estates, was re-appointed consignee with a direction to pay and keep down the annuities chargeable on the estates; and it was ordered, that he should pass his accounts annually before the Master, and be allowed therein all such sums as he should pay in respect of the annuities, and retain the balance from time to time in discharge of his incumbrance.

Under the stat. 3 & 4 Will. 4, c. 73, (for the abolition of slavery), the sums of 4938l. 17s. 4d. and 19l. 10s. 11d. were allowed by the commissioners as the compensation for the slaves on the estates called Non-such and Unity. These sums were by an order made in this cause and in a cause of "Grant v. Edwards," ordered to be paid into Court in trust in the last-mentioned cause; the dividends to be received by Grant, and to be applied, together with the proceeds of the estates, in satisfaction of Mrs. Weaver's annuity. By the same order, the order of August, 1824, as it related to the consigneeship of Grant, was adopted and confirmed.

SHAW D. SIMPSON.

The compensation money being paid into Court pursuant to the order, produced £5577, £3 per cent. Bank Annuities.

The accounts of the consignee were annually passed up to the 30th April in each year, and on the 30th April, 1840, there appeared to be a balance due to him of £935, in respect of advances made by him for the cultivation of the estates, and payments on account of Mrs. Weaver's annuity; the last payment on account of the annuity, having been made up to the preceding Michaelmas.

In consequence of this state of the accounts, there being no immediate prospect of an increase in the proceeds of the estates, Mr. and Mrs. Weaver, after receiving two more quarters of the annuity, presented their petition at the instance of the consignee, for the sale of part of the capital of the fund in Court. And by an order, dated the 24th July, 1840, it was ordered, that so much of the £5577 £3 per cent. Bank Annuities, as would raise the sum of £1185, should be sold, and applied in payment of £250 due to Mrs. Weaver at the preceding Midsummer, and of £935 due to the consignee. And it was ordered, that Grant should continue to pass his accounts as consignee, and should pay the remaining quarterly payments of the annuity to the 30th April, 1841, and should be at liberty to continue the quarterly payments after that day as theretofore, and should be allowed the same in passing his accounts; and that so much more of the £5577 stock should be from time to time sold, as might be sufficient to raise what the Master should, from time to time, certify to be due to Grant, on passing his annual accounts as consignee up to the 30th April, 1841, and also his subsequent accounts, including the payment of the said annuity; and that out of the money from time to time to arise by the said sales, what should be so certified

SHAW
v.
SIMPSON.

to be due to the consignee, should be paid to him in discharge of his balance; and that he should also receive the dividends of the remaining money in Court, as they should accrue due.

This order was from time to time acted upon, till the money in Court was reduced to £1810 £3 per cent. Annuities; but by an order of *Knight Bruce*, V. C., dated the 22nd March, 1842, it was directed, that no further part of the said £1810 stock should be sold until further order, and that the dividends thereafter to accrue due on the fund in Court should be paid to Mr. Weaver.

Grant now presented his petition, (which was headed in this cause and in that of "Grant v. Edwards," and also in the bankruptcy), alleging that on the faith of the order of the 24th July, 1840, he had continued to advance his own monies for the necessary expenses of the cultivation of the estates, and for the payment of the annuity; and that there was due to him on the 30th April, 1842, a balance of £3238, including £500 paid to Mrs. Weaver, on account of the annuity up to that time. And he prayed, that notwithstanding the order of the 22nd March, 1842, the £1810 stock might be sold, and the produce paid to him in part satisfaction of the £3238.

Mr. Burge, and Mr. Cooper, for the petition, said, that the consignee had a lien on the corpus of the estate, and consequently on the fund in Court, for the amount of his disbursements, and that here the lien would be useless, unless he were entitled to a sale of the corpus of the property: Scott v. Nisbett (a), Worrall v. Harford (b), Sayers v. Whitfield (c), Simond v. Hibbert (d), Campbell v. Bowden (e). They also contended that in Farquharson v. Balfour (f),

<sup>(</sup>a) 14 Ves. 438.

<sup>(</sup>b) 8 Ves. 4.

<sup>(</sup>c) 1 Knapp, P. C. C. 133.

<sup>(</sup>d) 1 R. & M. 719.

<sup>(</sup>e) In P. C.

<sup>(</sup>f) 8 Sim. 210.

which might possibly be cited on the other side, the opposition to the application, and as it should seem the judgment also, proceeded on the ground that the application was of an interlocutory nature. They also commented upon the proceedings which had taken place under the several orders before referred to.

SHAW 0. SIMPSON.

## Mr. Russell, and Mr. James Parker, contrà.

The Vice-Chancellor, in the course of the argument, said, that, with respect to the claim of the petitioner to have the corpus of the estate sold, he saw no solid ground of distinction between the case of a consignee of West India produce and the agent of a copper mine or colliery, who never could be heard to insist on a sale of the estate for payment of the balance due to him. The observations of Lord Eldon, in Scott v. Nisbett, seemed to refer to a dormant lien only. At all events, no case had been cited in which a sale of the corpus of the estate had practically been allowed.

The Vice-Chancellor.—Upon this petition, it is not, I think necessary, if it would be proper, to decide the general and extensive question which has been argued. Mr. and Mrs. Weaver being the only opposing parties, it occurred to me at first, that, having regard to the order of July, 1840, (which they have never sought to discharge or vary, and which has, to some extent, been acted upon), it might probably be right to apply the capital of the fund in question, or a sufficient portion of it, in paying or towards payment of so much of the consignee's balance now due to him, as was due at Michaelmas last, or has arisen in respect of time previous to Michaelmas last; the rent-charge, or annuity, of Mr. and Mrs. Weaver, which is the first charge on the property, having been paid up

July 26th.

SHAW 5. SIMPSON.

to that time inclusive. The farther discussion of the case. however, satisfied mc, that the rent-charge being in arrear from that period, and the time of passing the annual accounts being in the spring, there would be at least some risk of not acting in conformity with the spirit of the order, if I were to construe it as giving that right to the petitioner, without paying another half year of the rentcharge to Mr. and Mrs. Weaver. I think that I ought not so to construe it, and the petitioner having declined, and I suppose continuing to decline, to pay to them that half year, or allow them to receive it out of the fund in question, I shall not act upon the capital, as matters now stand, on the footing of the order of 1840. But, whether with or without reference to it, I conceive that, a part of the balance due to the petitioner being composed of payments to Mr. Weaver on account of the rent-charge, which certainly charges the corpus of the fund, I may and ought to allow the petitioner to receive from that corpus an amount equal to so much of his balance, in part payment of it; and I so order. This, however, will still leave a large sum due to him, as appears by the Master's report, which he had not obtained, when my former order was made. I think that I ought, also, to direct the dividends on the residue of the fund to be paid to him until further order, as they were before 1840, to be accounted for by him annually, in his character of consignee. It is my impression, that at the close of the argument before me. when I made my former order, the present petitioner did not object to what I then did as to the dividends. Except so far as I have stated, (the petitioner objecting to allow Mr. and Mr. Weaver to receive the additional half year that I have mentioned), I cannot, upon this petition. opposed as it is by them, dispose of the capital of the fund in question. All that became due to the petitioner up to the time when it was brought into Court, has been

The balance now due has altogether arisen subsequently. The estate in respect of the care and management of which it has so arisen, is still in the possession of the Court, and must probably so remain for some time longer, it being unsold. Whether at some future time the petitioner's remaining balance may not, if necessary, be paid out of the corpus of the property, I do not now say, or express an opinion. At present, I cannot do more than I have said. The costs must be reserved as before, with liberty to apply.

1842.

SHAW Ð. SIMPSON.

Thoughterm + h. in Dom Brow. 15 fer. 847.

CALDECOTT v. CALDECOTT.

THIS cause came on for hearing for further directions Residuary perconsequential on the decree of the 3rd March, 1842. (See of a testator. ante, pp. 324, 325).

The Master, by his report dated in July, 1842, in substance found that the canal shares mentioned in the 7th schedule to his former report were, at the time of the death of the testator, and had since continued, fit and proper investments for the purposes of the testator's will, &c., until at the period of the same should be laid out in the purchase of real estate; the testator's but that, having regard to the probable difficulty of disposing of them at any time, it would be proper that the terest on the same should be sold as opportunity would allow. And he (not exceeding found that the mortgages, except the equitable mortgage, be paid to the were, at the death of the testator, and had since continued, proper investments, and that it was not advisable to call them in; and that, as to the equitable mortgage, it was advisable to accept the offer of the mortgagor to convert it into a legal security upon certain terms. found, that since he had made his former report it had been discovered that the testator was possessed of five shares and five quarters in the Rugby Gas Company,

August 1st.

sonal estate which, at the time of his death, stood invested in securities not recognized by this Court, having been valued by the Master as one year after death, the Court ordered the invalue so taken il. per cent.) to tenant for life from the testator's death.

CALDECOTT
CALDECOTT.

which had been sold by the executors for £125, which was the best price, but which had not been yet paid.

In obedience to the directions of the Court, the Master likewise gave the respective valuations of certain property mentioned in the decree, at the respective periods of the testator's death, and one year after his death.

SUBJECT to the declaration contained in the decree dated the 3rd March, 1842, that, as between the income and the capital of the testator's estate, the income thereof ought to bear and is liable to keep down the interest and other yearly payments mentioned in such decree: Declare, that the plaintiff is entitled to receive the interest which has accrued from the testator's death on the sums of £500, £2500, and £6000, secured by the mortgages, and the sum of £6000 secured by the equitable mortgage, respectively mentioned in the Master's report, and to the interest hereafter to accrue thereon during the life of the plaintiff, or until the further order of the Court. And as to the shares in the Fire and Life Insurance Companies, and mortgages of Turnpike Tolls, mentioned in the said report, declare that the plaintiff is entitled to so much of the dividends and interest thereof respectively, which have accrued and have been received from the time of the said testator's death until the present time, as will not exceed interest at £4 per cent. per annum during the same period on the sums ascertained to be the value thereof respectively at the end of one year from the said testator's death, and to so much of the dividends and interest thereof hereafter to accrue and be received, until the same shall be sold or got in, or until the further order of the Court, as will not exceed interest at the same rate on the sums ascertained as aforesaid to be the value thereof. And as to the Bank Stock, and shares in the Rugby Gas Company, which have been sold as in the said report mentioned, declare the plaintiff entitled to so much of the dividends thereof accrued and received from the said teatator's death until the sale thereof as will not exceed interest at £4 per cent, per annum during the same period on the sum, as to the said Bank Stock, ascertained to be the value thereof at the end of one year from the said testator's death; and as to the said Gas Shares, in the sum of £125, the amount for which the same was sold. And as to the Canal Shares mentioned in the said report, let the dividends of such Canal Shares as have been sold, which accrued from the said testator's death until the same were sold, and the dividends of such of the said Canal Shares as have not been sold, which have accrued from the said testator's death until the present time, be paid to the plaintiff; and let the dividends of such last-mentioned shares hereafter to accrue until the same shall be sold, or until the further order of the Court, be paid to the plaintiff, he undertaking to refund such portion of any of the dividends hereby directed to be paid to him, as the Court shall direct.

And let such of the Canal Shares mentioned in the said report as have not been sold, be sold, &c., and the purchase monies be paid into Court. Let all sums now standing, or hereafter to be paid in to the credit of this cause, be laid out, &c.; and let the dividends on all Bank Annuities now or at any time hereafter to be standing in the name of the said Accountant-General, in trust in this cause, be paid the plaintiff during his life, or until the further order of the Court.

1842.
CALDECOTT

CALDECOTT.

#### SILLICK v. BOOTH.

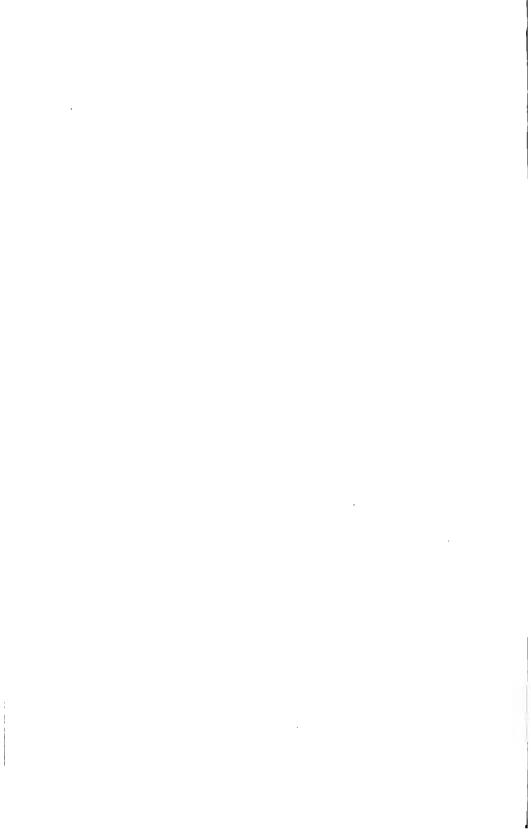
THE Reporters regret to find that they have misapprehended a passage in one of the Vice-Chancellor's judgments in this case. The passage in question (see ante, p. 125), should stand thus:—

"If the clause of survivorship does not extend to accruing shares, there was an intestacy as to James's share of Charles's share; but James's original share would go over to Mary and Richard. Then dies Richard. If the clause does not extend to Richard's portion of the shares of Charles and James, Richard's portion of those shares would go to Richard's representatives," &c.

#### BARNES V. RACSTER.

To the statement of this case (see ante, p. 404) it should have been added, that Mr. Lee, amicus curiæ, called the attention of the Court to the case of Titley v. Davis (a).

(a) Vin. Abr. Mortgage, (F), pl. 20.



# INDEX

TO THE

### PRINCIPAL MATTERS.

#### ACCOUNT.

See Costs, 1.
PLEA AND PLEADING, 5.

A bill having been filed by a client against the executrix of his solicitor for an account of all dealings and transactions between the plaintiff and the testator, and for an injunction to restrain an action brought by the defendant against the plaintiff to recover £3000 for money lent to him by the testator, the plaintiff after answer obtained an order for an injunction upon the terms of paying the money into Notwithstanding this order, however, the defendant, under particular circumstances, went to trial, and obtained a verdict for the £3000, upon the same evidence substantially as was afterwards used in the suit in equity, and which was satisfactory to this Court. No appeal having been made by the defendant against the order for the injunction: -Held, that, assuming the effect of that order to be, to bring the whole matter into this Court, and, therefore, prima facie, to entitle the plaintiff to an account of the £3000, as well as of all other matters comprised in the suit, yet, taking into consideration the verdict at law and the evidence in equity, the defendant was entitled to have the £3000 deemed an item in the account; such item, under the particular circumstances of the case, bearing interest at the rate of £4 per cent. per annum. Abbey v. Petch, 258

#### ADMINISTRATION.

See LETTERS OF ADMINISTRATION.
PRACTICE, 14.
PRESUMPTION, 2.

ADMISSION OF ASSETS. See PLEA AND PLEADING, 3.

### ADVANCEMENT.

1. The purchase by a father, of shares in a joint-stock bank, in the name of his son, held, under the circumstances, not to be an advancement for the son. Scawin v. Scawin, 65

2. Evidence of declarations coupled with acts. Ibid.

3. Parol evidence as to the intentions of a testator by the attorney who made the will.

Ibid.

4. Quære, whether a person having a life interest in a fund, with a right of consenting to the advancement of children out of the capital, destroys the power of advancement by assigning the life interest? Whitmarsh v. Robertson,

AFFIDAVIT.
See PRACTICE, 4.

#### AGREEMENT.

See DEBTOR AND CREDITOR, 2. VENDOR AND PURCHASER.

- 1. Two young officers in the army sign and hand over to each other certain documents, by which each charges his real and personal estate with £1000 in favour of the other, in case the other should survive him; the inducement for this undertaking, as expressed on each instrument, being that the other had, by an instrument of even date, left the writer the same sum in case the writer should survive The officers soon afterwards separate, and after the lapse of many years, agree to cancel the engagement, but die before the mode of cancelment is definitively settled:—Held, that, taking into consideration the circumstances under which the instruments were made, and the situation in life of the parties, the survivor had no purely equitable claim which he could enforce against the estate of the other. Quære, whether he had a legal claim; and whether, if legal originally, it was not legally cancelled. Ryan v. Daniel, 60
- 2. Specific performance decreed of a parol agreement deposed to by the plaintiff's witnesses, but denied by the answer; the agreement constituting a material part of the consideration for which the plaintiff had assigned his lease to the defendant, although such consideration was not expressed in the deed of assignment. Clifford v. Turrell.
- 3. Feme covert being entitled under her marriage settlement to an interest in the settled lands for her separate use for life, with a power of leasing for any term not exceeding twenty-one years in possession, leased part of the lands for fourteen years to D., and about a year and a half before the expiration of that lease, signed and delivered to D. a written under-

taking, by which she engaged, upon the expiration of the existing lease, to grant to D. a new lease, upon the same terms and for the same period as before. The lease expired, and D. continued in possession without taking a new lease, but doing acts on the premises which were solely referable to the written undertaking. Afterwards the feme covert died: Held, first, that the giving the written undertaking was, under the circumstances, a valid execution of the power; and, secondly, that the transaction between the parties amounted to an agreement, which was in part performed by the continuance of the possession of the tenant after the expiration of the lease, and was therefore capable of being enforced in a court of equity. Dowell v. Dew,

- 4. In order to establish the validity of an agreement in a court of equity, it is not necessary to shew that it was binding on both parties at the time of its being signed; it is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other.

  1bid.
- 5. Although a lessor has power to lease in possession only, and not in reversion, yet an agreement entered into between lessor and lessee, a short period before the expiration of an existing lease, for a renewal of the lease upon the same terms as before, is reasonable, and may be enforced in equity, as between the agreeing parties; provided the effect of the agreement is, that the rent and covenants in the renewed lease are conformable with the terms of the power. *Ibid.*
- 6. The assignee of a contract to grant a lease (there being no covenant not to assign, or the breach of such covenant being waived) may sustain a bill in equity against the lessor for specific performance of the contract, provided he guarantee to the

lessor the responsibility of the assignor.

Ibid.

7. Action directed to be brought with a view of ascertaining whether a rent agreed to be paid at a future period was, conformably with the terms of a settlement, the best rent that could be gotten for the property, and whether certain circumstances amounted to a waiver of the breach of a covenant not to assign.

1bid.

8. Specific performance of an agreement refused, the same not having been accepted by the plaintiff in due time, nor any acceptance by him ever notified to the defendant, and the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms. Thornbury v. Bevill, 554

9. Quære, whether a court of equity will enforce the specific performance of an agreement, that, upon the retirement of a solicitor from a copartnership, the remaining partner shall carry on the business in the name of the retiring partner.

101.

10. Quære, whether the signature of an attorney to a statement at the foot of a draft agreement, signifying his approval of the draft on behalf of his client, is a signature within the Statute of Frauds.

1bid.

#### AMENDED BILL.

See Plea and Pleading, 12.

The mere fact of amending a bill does not of itself dissolve or discharge the common injunction, though it may furnish a ground for dissolving or discharging it on an application for that purpose. Brooks v. Purton, 271

### ANNUITY.

See Colonies. Will, 11.

1. By an indenture, dated in April, 1810, an annuity was granted to S.,

charged upon real estate, and by an indenture dated in April, 1820, the same property was charged by the same parties with an annuity payable This annuity was void for want of a proper memorial, but until the filing of the bill it had been always treated as a valid annuity. and in September, 1821, A., under a proviso in his annuity deed, entered into possession and receipt of the rents and profits of the estate, and remained in undisturbed possession of them till his death in 1829, when his personal representative took possession. In 1835, S. died, and in November, 1839, his personal representative filed his bill to set aside A.'s annuity and to establish his own. The bill alleged that S. had received payment of his annuity down to October, 1820, and that A. had obtained possession of the premises under misrepresentation. These allegations, however, were not proved against A., nor was it proved that he ever had notice of S.'s title, but the allegation of payment was admitted by the grantors of the annuity, who were co-defendants with A. in the suit. Under these circumstances, and considering that S. had never been in possession of the property: -Held, 1st. That, notwithstanding the infirmity of A.'s title, the plaintiff was not entitled to the relief prayed by his bill. 2ndly. That he was not, in consequence of the admissions of A.'s co-defendants, entitled to any inquiry as against A., with a view to obviate the effect of delay in filing the bill. 3rdly. That his bill must be dismissed with costs as against A., on the ground of length of time. Searle v. Colt, 36 2. Courts of equity will give effect to the penal clauses of the annuity

2. Courts of equity will give effect to the penal clauses of the annuity acts, not merely in questions between the grantor and the annuitant, but in those between prior and subsequent annuitants.

Ibid.

CCC

3. The construction of the stat. 3 & 4 Will. 4, c. 27, discussed with reference to the right of the grantee of an annuity charged on land to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, punctual payment of the annuity, and no acknowledgment in writing of the grantee's title. *Ibid.* 

4. A bill in equity may lie to recover the arrears of an annuity, although, under the circumstances, the plaintiff may have no right to call on the Court to direct security to be granted for payment of such annuity.

Clifford v. Turrell, 138

### ANSWER.

See Plea and Pleading, 3, 4, 5. Practice, 2, 10. Principal and Agent, 1.

APPEARANCE. See Practice, 3, 13, 17.

### APPOINTMENT.

1. By a marriage settlement of 1791, certain estates at B. were charged with the sum of £10,000 for portions for the children of the marriage, in equal shares; and by the same instrument power was given to substitute for those estates other estates of equal value, as a fund for raising those portions. By a deed of 1811, the settlor covenanted that as soon as estates at H. were disincumbered, he would charge them, in substitution for the other estates, with the payment of £10,000 for portions, under the same limitations as had been expressed in the settlement, and would also further charge the same estates at H. with the sum of £30,000 for the younger children of the marriage, to be paid to them in such shares and proportions as he the settlor should by deed or will appoint. By a deed of 1816 (which was a general conveyance of all the settlor's estates in trust for payment of his debts), reciting amongst other things that the settlor had not then performed the covenant contained in the deed of 1811, it was declared that the trustee of that deed should hold the estates at H., or otherwise convey the same to the trustees of the settlement for the purpose of securing the portions according to the deed of 1811. And by a deed of 1816, reciting the former deeds, the trustees of the deed of trust, by the direction of the settlor, conveyed the estates at H. to the trustee of the settlement, upon trust, after the death of the settlor, to raise £10,000 in lieu and satisfaction of the £10,000 under the settlement, in trust for all and every the children of the marriage, under the same limitations as were contained in the settlement, and upon trust to raise the further sum of £30,000 for all and every the children of the marriage except the eldest son J., in the same manner in all respects, excluding the said J., as by the indenture of settlement was declared concerning the sum of £10,000 thereby directed to be raised:—Held, that the deed of 1817 was a complete execution of the power of appointing the £30,000 contained in the deed of 1811; and, consequently, that the younger children of the marriage who were living at the time of the execution of the deed of 1817 were entitled to the £30,000 in equal shares. Armytage v. Armytage,

2. A father executed a power of appointment, under which his four younger children, B., C., D., and E., became entitled, subject to his life interest, to £30,000 in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C., and D., in the following shares; viz. to B. £13,000, to C. £5000, and to D.

BARON AND FEME.

£12,000. E., who was a son, died in his father's lifetime intestate and without issue; whereupon his share devolved to the father. After E.'s decease, the father, with a view to support the subsequent appointments, executed a deed-poll, declaring that the original appointment under which the children took equally was made by mistake:—Held, that though the subsequent appointments were invalid, so far as related to the shares of B., C., and D., yet as regarded the share of E., the father was bound by the statement in the deed-poll; and that E.'s share, amounting to £7,500, must be apportioned between B. and D., in satisfaction pro tanto of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective

shares.

Ibid.

3. By a post-nuptial marriage settlement, property in the funds belonging to the wife, was settled in trust for the husband and wife for their lives and the life of the survivor, and then for such one or more exclusively of the others or other of the children of the marriage, in such parts and shares, &c. as the wife should by deed or will appoint. There were four The huschildren of the marriage. band died, and the wife appointed the whole fund, and assigned her life interest therein to the eldest child, a daughter, who had attained the age of twenty-one, but who, together with the other children, was living with her mother: -Held, that the appointment and assignment were valid, and a trustee refusing to join in the transfer of the fund, pursuant to the appointment, was not allowed his costs of a suit brought against him by the daughter to compel the transfer, though, under all the circumstances of the case, he was not decreed to pay the costs of the suit. Campbell v. Home. 664

APPORTIONMENT.
See Appointment, 2.
Tithes. 4.

APPROPRIATION.
See Executor, 2.

ARBITRATION.
See Joint Stock Company, 7.

ASSETS.

See Escheat.
Lunatic.
Parties.
Plea and Pleading, 3.

ASSIGNMENT.

See Advancement, 4.
AGREEMENT, 6.
EXECUTOR, 2.
PLEA AND PLEADING, 7.

ATTACHMENT.
See Practice, 4, 5.

ATTORNEY.
See AGREEMENT, 8, 9, 10.
Evidence, 1.

ATTORNEY AND CLIENT.

See Account.

AWARD.

See Joint Stock Company.

BANK OF ENGLAND. See PRACTICE, 1.

BANKERS.

See Joint Stock Company, 1.

BANKRUPT AND BANK-RUPTCY.

See Official Assignee. Practice, 19.
Revivor.
Supplemental Bill.

BARON AND FEME.

See Husband and Wife.

Policy of Insurance, 1.

C C C 2

### BILL OF DISCOVERY.

In a suit instituted against the Corporation of London for discovery, in aid of a defence to a bill brought by them for an account of certain alleged dues to which they claimed a title by prescription, the corporation admitted the possession of certain charters, books, and documents relating to the matters in question, which they alleged formed part of their title, and were intended to be used as evidence against the plaintiffs, but which they did not with sufficient precision deny might form part of the plaintiffs' title, or contain matter impeaching their own defence:—Held, that the plaintiffs in the bill of discovery were entitled to the production of such documents. Combe v. Corporation of London. 631

BILL OF EXCHANGE.

See STATUTE OF LIMITATIONS, 4, 7.

### BOND.

See Debtor and Creditor, 3, 4. Principal and Surety, 2.

BOUNDARIES. See Colonies, 2.

BREACH OF COVENANT.
See AGREEMENT, 7.

BREACH OF TRUST.

See Poor Rate.

TRUST AND TRUSTEE.

### CHARITY.

1. Testatrix bequeathed a legacy to her executors, to be settled by them, so that the interest might be yearly paid to the poor of the parish of O.:—Held, that it was a misapplication of the legacy to give it to the funds of a charity which extended over other parishes besides that of O.,

and which was regulated by a deed giving absolute control over the legacy to the directors of and subscribers to the charity. Attorney-General v. Brandreth, 200

2. Scheme directed, without a reference. Ibid.

3. Where a charity had been instituted for the common benefit of a parish, and the parishioners, on an information filed for the regulation of the charity, agreed that education should form part of the scheme; the Court, although the parishioners were of various religious denominations, refused to sanction a system of education, in which it was proposed that particular selections from the Scriptures should be read, and the schools should be closed on Sundays, and in which no special provision was made for the religious creed of the schoolmaster. Attorney-General v. Cullum,

4. Courts of equity in this country will not sanction any system of education in which religion is not included, and where education is to be provided for Christians of different denominations, there, by reason of the necessity of teaching religion according to particular tenets, and the difficulty of teaching different persons according to different tenets, instruction according to the doctrines of the Church of England must prevail; but provision will be made, as far as possible, for the exercise of conscientious scruples on the part of Dissenters. Ibid.

> CHOSE IN ACTION. See Husband and Wife,

# COLONIES. See WILL, 23.

1. The Courts of this country, in dealing with real property in Jamaica, will be guided by the law of evidence in Jamaica. *Tulloch* v. *Hartley*, 114

2. A court of equity in England will entertain a bill to settle the boundaries of real estates in Jamaica.

> CONCURRENT SUITS. See PRACTICE, 15, 16.

CONDITIONS OF SALE. See VENDOR AND PURCHASER, 4, 9.

# CONSIGNEE.

See COLONIES.

1. The consignee of a West India estate, who had, out of his own monies, made payments on account of an annuity charged on the estate, was held entitled to be reimbursed such payments out of compensation money which had been awarded under the act for the abolition of slavery. Shaw v. Simpson,

2. Quære, whether such a consignee has a lien on the corpus of the estate for monies expended by him in its cultivation? Ibid.

# CONSTRUCTION OF ACTS OF PARLIAMENT.

See Annuity, 2, 3. JOINT STOCK COMPANY, 6. LEGACY AND LEGATEE, 1. MORTGAGOR & MORTGAGEE, 3. PLEA AND PLEADING, 6. PRACTICE, 1, 19. STATUTE OF LIMITATIONS, 1, 2, 3, 4, 5, 6.

### CONTRACT.

See AGREEMENT. VENDOR AND PURCHASER.

> CONTRIBUTION. See PRACTICE, 18.

CONVERSION. See WILL, 9, 10, 19. CORPORATION OF LONDON. See BILL OF DISCOVERY.

### COSTS.

See Appointment.

MORTGAGOR AND MORTGAGEE, I. PRACTICE, 10, 11, 14, 18. PRINCIPAL AND AGENT, 2.

1. In a suit to restrain the piracy of a literary work, a plaintiff, who in opposition to the defendant's denial of his title, obtains an injunction, is entitled to an answer from the defendant, for the purpose of having his title admitted, (in case, by arrangement between the parties, the title is not established at law); and also, of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff, therefore, under such circumstances, is entitled to the costs of the suit, including the answer, as between party and party; and if by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between party and party, although at the hearing he may waive the account. And the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer, with a view to obtain terms more beneficial to himself than the Court would, under any circumstances, accord to him; as, for instance, with a view to receive costs as between solicitor and client. Kelly v. Hooper, 197

2. Trustees of the separate estate of a married woman decreed to pay the costs of a suit instituted to compel them to transfer the fund into her Thorby v. Yeats,

3. Extra costs occasioned by an infant being made a defendant, who ought to have been made a plaintiff, not allowed. Hosking v. Nicholls, 478

4. Trustees who had declined to transfer a fund to an assignee on the ground of an alleged fraud in the assignment, were held entitled to their costs as between solicitor and client, although the assignment was decreed to be carried into execution; there being some circumstances of suspicion attending the assignment, particularly a variance between the consideration expressed in the deed and the actual consideration. Whitmarsh v. Robertson, 438

# COURT OF BANKRUPTCY. See Practice, 19.

CURATE. See Tithes.

# DEBTOR AND CREDITOR.

See Heir-at-Law.
Interrogatories.
Mortgagor and Mortgagee.
Plea and Pleading, 6, 11.
Practice, 12.
Principal and Surety, 1.
Statute of Limitations, 5, 6, 7, 8.

1. Testator devises all his real estate in trust for the payment of his debts. At the time of making his will he is tenant in fee of several estates, and tenant in tail, with remainders over, with remainder to himself in fee, of an estate called B., of which he afterwards suffers a recovery and dies without republishing his will. Quære, whether, in the administration of his assets, the estate B. is applicable to the payment of his specialty creditors before the devised estates. Vickers v. Oliver, 211

2. J. S., under the belief that he had the fee-simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title and for further assurance. It

turned out that at the time of the conveyance the mother had the fee-simple, which upon her death descended to J. S. as her heir-at-law:—Held, that, although no estate passed by the conveyance, yet the transaction amounted to a contract for sale of the specific estate, and that J. S., unless he could set aside the contract for fraud, was in equity compellable to carry it into execution. Smith v. Baker, 223

3. On the marriage of A. and B., the fortune of B., which consisted partly of a sum of money due from C. to D., and secured by the bond of C., was settled on the intended husband and wife and their issue. bond was not referred to in the settlement, but the wife's fortune was therein stated to have been paid to the trustees; and power was reserved to the trustees to lend the wife's fortune to A., the husband, on his personal security. The marriage took effect, and some years afterwards the son of A. and B. filed his bill against C. to recover the money due upon the bond, alleging that C. with knowledge of the existence of the settlement, and that according to its provisions the money ought to have been paid to the trustees, wrongfully paid the money to A., who had wasted it and become bankrupt. In support of the allegation as to C.'s knowledge of the provisions of the settlement, the plaintiff gave some general evidence connecting him with that instrument: as that he was brother-in-law of B., that the parties married from his house, that he was spoken to on the subject of the settlement, that it was prepared by his attorney, and that he was present when it was read over previously to execution; but the bond was not produced, nor was there any proof of its existence, and C. by his answer (which was in evidence) averred that it had been long since satisfied: -Held, under these circumstances, that the

plaintiff could not recover from C. the amount of the bond. Rose v. Clarke,

534

4. An equitable title to money secured by bond is not of itself sufficient to entitle the party interested to sue the obligor in equity for payment of the money.

1bid.

5. Before a payment by a debtor to, or under the direction of, his legal creditor, can be impeached or avoided to the prejudice of the debtor, it must be shewn clearly either that the debtor was subjected to the obligation of seeing to some particular mode of application of the money, which was not pursued, or that the debtor having notice of circumstances rendering it inequitable for the legal creditor to receive or direct the payment, could reasonably and with safety have avoided making the payment.

1bid.

## DEEDS AND DOCUMENTS.

See Production of Deeds and Documents.

### DEMURRER.

See Plea and Pleading, 6. Practice, 10.

DEVASTAVIT. See Executor, 1.

DEVISE.
See WILL.

DISCLAIMER.
See OFFICIAL Assignes.

### DISCOVERY.

See BILL OF DISCOVERY.
PARTNER AND PARTNERSHIP, 1.

DISMISSAL OF BILL.
See PRACTICE, 11.
REVIVOR.
SUPPLEMENTAL BILL.

DISSENTER. See Charity, 3, 4.

DISTRINGAS. See Practice, 1.

EDUCATION.
See Charity, 3, 4.
Infant.

### ELECTION.

Upon the construction of a will, held, that the widow of a testator was bound to elect between the benefits given her by the will and freebench in part of the devised estates. Taylor v. Taylor, 727

### ESCHEAT.

A. died intestate, unmarried, and illegitimate, having mortgaged his real estates to B. for 500 years, and having subsequently mortgaged them to B. for an additional sum, by deposit The fee-simple of the title-deeds. was not worth the mortgage money: -Held, nevertheless, that the mortgagor could not be deemed a bare trustee for the mortgagee within the stat. 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the Crown of the equity of redemption; but it was ordered, that the estate should be sold in the administration of assets, and B. declared a purchaser, with liberty to apply to the Crown for a grant of the feesimple. Rogers v. Maule,

### EVIDENCE.

See Advancement, 1, 2, 3.
Annuity, 3.
Colonies, 1.
Letters of Administration.
Plea and Pleading, 4, 5, 8.
Practice, 2, 3, 4, 6, 12.
Presumption, 1, 2.
Principal and Surety, 1.
Vendor and Purchaser, 3, 4, 6.
Wile, 1, 20, 21.

1. Entries in the books of the deceased attorney of the defendant admitted as evidence for the plaintiff in a bill of foreclosure, to prove that the whole mortgage money had been paid to the defendant, and that there was no usury; such entries, though not against the interest of the attorney, being found in an account in which there were entries against his interest, Clark v. Wilmot, 53

2. Where there is one consideration stated in a deed, proof may be given of any other consideration which did take place, and which is not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated. Clifford v. Turrell,

3. On a bill by a married woman against her trustees to obtain a transfer of her separate property, it is not in ordinary cases necessary to prove the marriage. Thorby v. Yeats, 438

4. The court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to shew that the original instrument was not stamped. Rose v. Clarke, 534

### EXECUTOR.

See Parties, 1. Plea and Pleading, 3.

1. On a bill filed against an executor, seeking to charge him in respect of devastavits committed by his co-executor, who had died, the defendant, by his answer, denied that he had ever interfered in the testator's affairs in the life-time of the co-executor; and it was admitted that he had not proved the will till the death of that executor:—Held, nevertheless, upon the evidence of two witnesses, speaking to different facts, but corroborated by circumstances, more especially by the fact of a composition deed having been executed by the surviving execu-

tor with the executor of the deceased, that there was a sufficient ground for inquiring into the acts of the surviving executor. The Court accordingly directed special enquiries on the subject. James v. Frearson, 370

2. Testator bequeathed to A. and B., two of his three executors, so much money as would purchase £6666 consols, which stock he directed should stand in their joint names, upon trust to pay the dividends to C. for life: the capital, after C.'s death, to sink into the residue. He then, out of the residue, gave several pecuniary legacies, amongst which was a legacy of £5000 to B., and bequeathed the surplus residue to D. Upon the death of the testator, A. and B. purchased the consols, pursuant to the directions of the will. A. afterwards died, and then B. sold out the stock, and applied the proceeds to his own use:— Held, that quoad B. no appropriation was made of the stock, so as to separate it from the residue, and consequently, that C. and D. were entitled to be reimbursed rateably out of B.'s legacy of £5000 the losses which they had respectively incurred by means of B.'s breach of trust. Morris v. Livie. 380

3. If an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore, if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust.

1bid.

EXTINGUISHMENT OF CHARGES.

See WILL, 23.

FEME COVERT.

See AGREEMENT, 3.

HUSBAND AND WIFE.

FORECLOSURE. See Mortgagor and Mortgagee.

FOREIGNER. See JOINT STOCK COMPANY.

> FREEBENCH. See ELECTION.

### HEIR-AT-LAW.

See Issue, Devisavit vel non.

Real estate in India being made by statute personal assets for the payment of the debts of a deceased debtor, it is unnecessary to make the debtor's heir-at-law a party to a suit instituted for the administration of the assets. Story v. Fry, 603

HUSBAND AND WIFE. See APPOINTMENT.

Costs, 3, 4.

DEBTOR AND CREDITOR, 2, 3, 4. Evidence, 3.

POLICY OF ASSURANCE, 1.

1. By a settlement executed upon the marriage of A. with B., the daughter of W., trusts were declared of two several sums of £5000, whereof one was secured by the bond of W., and the other by the covenant of A., and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payment of the latter sum, A. assigned to the trustees certain policies of assurance, which he had effected on his own life, to the value of the principal money comprised in his covenant. The trusts declared of the former sum were for B. for life, for her separate use, and after her death for A. for life. and after the death of both, and in default of children of the marriage, for the benefit of B.'s estate. The trusts of the latter sum were for B. for life, and after her death, failing children of the marriage, for the executors, administrators, and assigns of After the marriage A. became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividend received under that proof in the purchase of £431 consols. At the same time W. purchased of A.'s assignees all A.'s interest in the settlement, and took from them an assignment of that interest. A. afterwards died: whereupon the trustees received the produce of the policies, and invested it in £5992 consols. Ultimately. W. became bankrupt and died: Held, that, notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and assignment from A.'s assignees, the assignees of W. could take no interest in the £5992 stock. without first satisfying the trustees of the settlement what was due to them in respect of W.'s bond for £5000. And quære, whether, notwithstanding the assignment to W. of A.'s interest under the settlement, A.'s assignees had not a right to recall the dividend which produced the £431 consols? Burridge v. Row,

2. A.'s assignees having disclaimed in Court all interest in the £431 consols:—Held, that the trustees of the settlement having acquired possession of that sum in the character of trustees, were entitled to retain such possession for the purposes of the settlement until full satisfaction should be made of what was due to them in respect of W.'s bond for £5000.

Ibid.

3. By a clause in a marriage settlement, trustees were empowered and required, at the request in writing of the wife, to advance part of the trustmonies to the husband on the security of his bond. After the marriage the husband was arrested, went to prison,

and took the benefit of the Insolvent Debtors' Act. The wife then applied to the trustee for a loan to the husband, according to the terms of the settlement:—Held, that such a change had taken place in the circumstances of the husband, as rendered the clause inapplicable to him, and consequently that the trustee was justified in refusing to lend the money. Boss v. Godsall,

4. Quære, whether the assignment by a husband of the dividends of a fund to which his wife is entitled for her life, carries the dividends which may accrue in her lifetime after his decease? Whitmarsh v. Robertson,

ILLEGITIMATE CHILDREN.

See Voluntary Settlement.

INCUMBRANCE.
See Mortgagor and Mortgagee.

INFANT.

See PRACTICE.
RECEIVER, 1.

A father, by will, directed that his son should be brought up by certain persons, whom he named guardiaus, in the Roman Catholic faith. The fortune left to the child by the father was very small, and he was maintained alternately by Roman Catholic and Protestant relations, without any interference on the part of the guardians, till he was about fifteen, when the Protestant relation with whom he lived died. It appeared, that he had been brought up principally as a Protestant; and it was alleged, that he preferred the Protestant faith. Court, under the special circumstances of the case, undertook to see the infant before making an order as to the mode of his education and maintenance. Whitty v. Marshall,

INJUNCTION.

See Amended Bill.
Plea and Pleading, 15.
Practice, 19.

In an action at law, the defendant paid into the court of law the sum demanded in the action, and filed his bill in equity to restrain the action. and obtained the common injunction restraining the plaintiff at law from proceeding to execution. The plaintiff at law having tried the action and obtained a verdict, applied for and obtained a rule nisi to shew cause why the money paid into the court of law should not be paid out to him:— Held, that this proceeding was a step towards execution, and was a breach of the injunction. Brooks v. Purton. 274

INSOLVENT ACT.

See Husband and Wife, 3. Plea and Pleading, 6. Practice, 11.

INTEREST OF MONEY.

See STATUTE OF LIMITATIONS, 1, 2.

Residuary personal estate of a testator, which, at the time of his death, stood invested in securities not recognized by this Court, having been valued by the Master as at the period of one year after the testator's death, the Court ordered the interest on the value so taken (not exceeding 41. per cent.) to be paid to the tenant for life from the testator's death. Caldecott v. Caldecott, 737

### INTERROGATORIES.

Under the usual decree in a creditors' suit, the Master allowed an interrogatory to be exhibited for the examination of the administratrix, which was in very special terms, containing enquiries not suggested by the

pleadings, as to monies which she had not received, and why the same had not been received. The interrogatory was disallowed. *Hopkinson* v. *Bagster*,

### INTESTACY.

See Letters of Administration. Presumption, 2.

# ISSUE, DEVISAVIT VEL NON.

Bill by devisees against an heir-atlaw, alleging suppression by the heir of the testator's will, and praying delivery up of the premises. No case of suppression was made at the hearing, but the plaintiffs shewed distinctly that the will under which they claimed had existed, and was in the house of the testatrix within two years before her death, during which two years the heir-at-law, with his family, had been living in the house: -Held, that this was a case for an inquiry, and for an issue as to whether the testatrix did devise the lands in manner alleged. Smith v. Spencer, 75

### JOINT STOCK COMPANY.

1. By one of the clauses in a deed of settlement on the formation of a jointstock banking company it was provided, "that all debts due to the Company by or on the part of any proprietor in respect of cash advances or otherwise, should at all times and in all cases be the first and paramount lien on all the shares and stock of such proprietor; and the directors were empowered to cancel, extinguish, and declare forfeited, or to sell and dispose of such shares, either wholly or in part, as the case might require, by way of or towards satisfaction or liquidation of such debts; and that every such person should thenceforth cease to be a proprietor of the company, or to retain any interest therein in respect of the shares so cancelled, extinguished, and declared to be forfeited, or so to be sold or disposed of as aforesaid." A holder of 1000 shares being indebted to the bank for cash advances, a notice dated the 30th May, 1837, was given to the shareholder, that unless he redeemed the 1000 shares by payment of the balance of his account with the bank on or before the 13th day of June, the directors would on that day proceed, under the clause of the deed of association, to cancel and extinguish, and declare his shares forfeited, and to place the value of the shares on that day to the credit of his account with the bank. The balance not being paid, the directors by a resolution declared the shares to be cancelled and forfeited, and it appearing to them that the value of the shares on that day was £10,000, it was resolved that credit should be given to the proprietor for that amount in his account. A bill was filed to set aside the cancellation. From the evidence it appeared that the market price of shares, on the 13th day of June, slightly exceeded the price allowed by the directors, but the evidence proved, that, if the 1000 shares had been carried into the market, the price would have been reduced greatly below the amount allowed by the directors: -Held, that the directors placing themselves by the cancellation in the situation both of vendors and purchasers, were bound to allow the highest market price which could be obtained for the shares, without speculating on what might be the effect of throwing the 1000 shares into the market, and the cancellation was declared to be void, and was set aside. Stubbs v. Lister,

2. In February, 1825, a joint stock company was established for the purpose of working a mine, the capital of which was to consist of 200 shares of

The directors had power £50 each. to exact the full payment of £50 on each share, but if further aid were required, then they were to call a meeting of proprietors and submit to their decision the propriety of increasing the number of shares, or of taking such other steps as might appear ad-The plaintiffs, who were visable. shareholders, paid the full amount of their calls, but in October, 1826, were informed by the secretary of the company, that he had some time since mentioned to a person (who was the plaintiffs' agent for payment of their calls), that in the previous July the directors had resolved to increase the amount of calls on each share. this the plaintiffs objected, and they refused to pay the additional calls. An altercation by letter ensued till about August, 1828, when the plaintiffs, as they alleged, left the country. In July, 1828, their shares were declared forfeited. The other shareholders then continued to work the mine, but the concern was unsuccessful till the year 1835, when it began to make an increasing profit. In November, 1837, the plaintiffs, as they alleged by their bill, returned to this In September, 1838, they country. filed their bill to be let into the receipt of the profits with the other shareholders. It did not appear in evidence whether the plaintiffs were absent from this country, or where they were, between August, 1828, and November, 1837, except that it was admitted by the defendants that in 1828 they were in Jersey. Many acts of irregularity and misconduct in the management of the concern during the interval were admitted by the defendants, and amongst others the fact that, during a great portion of that period, the concern was managed by an insufficient number of directors. The plaintiffs had no means, under the deed of settlement, of dissolving

the society:—Held, that the plaintiffs, not having sufficiently accounted for their acts and conduct during the interval between August, 1828, and November, 1837, must be considered as having acquiesced in the conduct of the directors and other shareholders in the concern, and were not entitled to the relief sought by their bill. Prendergast v. Turton, 98

3. H. being a director of a joint-stock company, established for the building, purchasing, hiring, and employment of steam-vessels, purchases a vessel for £1340, and afterwards sells it to the company as from a stranger, for £1500, charging the company with commission at £1 per cent., the broker's earnest money, and the expenses of the bill of sale to himself, there being but one bill of sale. Such a transaction cannot stand in a court of equity. Benson v. Heathorn,

326 4. A ship's husband, being the servant of the ship-owners, holding an important office, and open to the vigilant superintendence of his employers, it is primd facie a breach of trust in any director of a company established for the purpose of acquiring and working of vessels, especially where the directors have the exclusive management of the concern, to take upon himself the duties of ship's husband. Where, therefore, in a company so constituted, one of the directors, with the consent of others forming with himself a board of directors, undertook the office of ship's husband, and in that character received out of the funds of the company such sums for commission and brokerage as are usually allowed to the ship's husband:—Held, that he must refund those monies; and semble, that the other members of the board of directors were similarly responsible in the event of any inability in the principal party implicated to refund.

- 5. A bill may be brought by the present directors of a joint-stock company on behalf of themselves and all other the members of the company, against the former directors of the company, for the purpose of being relieved against a fraud in which all the former directors are alleged to have been involved.

  15 Ibid.
- 6. Semble, that the stat. 3 & 4 Will. 4, c. 55, s. 33, which authorizes a particular mode of registering vessels belonging to joint-stock companies, does not apply to a joint-stock company in which foreigners are shareholders.

  15id.
- 7. Semble, that a covenant to refer all matters in difference between shareholders of a company to arbitration, the submission and award to be binding and conclusive on the parties, "without further suit or trouble," is no bar to a suit in a court of equity between the same parties and for the same matters.

  1 Ibid.

### JURISDICTION.

See Colonies.
Plea and Pleading, 8.

### LEGACY AND LEGATEE.

See EXECUTOR, 2, 3.

PLEA AND PLEADING, 3, 13, 16.
PRACTICE, 14.
STATUTE OF LIMITATIONS, 1, 2.
TESTAMENTARY INSTRUMENT.
VESTED INTEREST, 1, 2.
WILL.

- 1. Upon a constructive admission of assets:—Held, that residuary legatees were entitled to immediate payment of their legacies; and, under circumstances, with interest beyond the time allowed by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40). Dinsdale v. Dudding,
- 2. Testator bequeathed the sum of £4000 capital stock in the £3 per cent. Consols, or in whatever of the

- government funds the same should be found invested:—Held, that this was a specific legacy; and that the executor having paid one dividend on the stock, which became due within a year after the testator's death to the residuary legatee, must refund to the specific legatee. Hosking v. Nicholls,
- 3. Legacies to the children (by name) of the testator's late niece M., to be assigned to them, when and as soon as they should respectively attain twenty-five. Provided that if any should die under twenty-five leaving issue, the issue to take the parents' legacy, but if any should die, under twenty-five without having issue then living, the legacy of the child so dying to go and be paid to the "survivors and survivor, and others and other" of the same children, in equal shares. At the death of the testator. all the children of M. are under All afterwards attain twenty-five. twenty-five, except A., who dies under that age without issue, having survived two of the children, B. and C. The share of A. devolves to the representatives of B. and C., together with the children who survive A. Slade v. Parr,
- 4. Upon the construction of a will, held, that the surplus dividends of a legacy, after payments for maintenance during the minority of the legatee, followed the corpus. Ibid.

### LENGTH OF TIME.

See Annuity, 1, 2, 3.
Statute of Limitations.

### LESSOR AND LESSEE.

See AGREEMENT, 3, 4, 5, 6, 7. WILL, 19.

# LETTERS OF ADMINISTRA-TION.

In a suit instituted in this Court

for the distribution of the assets of an intestate, the grant of letters of administration is not conclusive evidence upon the question who is the intestate's sole next of kin. Barrs v. Jackson, 585

LETTER OF ATTORNEY. See PRINCIPAL AND SURETY, 2.

### LUNATIC.

In the case of necessaries supplied to a lunatic, the law raises a contract by implication on the part of the lunatic, under which the amount of such necessaries may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets. Wentworth v. Tubb,

MAINTENANCE. See Infant.

MARRIAGE SETTLEMENT.

See Appointment, 1, 2, 3.

Debtor and Creditor, 2, 3, 4.

Husband and Wife, 3.

Policy of Assurance, 1.

MEMORANDA.
See Promotions.

MIDDLESEX REGISTRY ACTS. See MORTGAGOR AND MORTGAGEE, 3, 4.

MINES AND MINERALS. See Plea and Pleading, 14.

MINING COMPANY.

See Joint Stock Company, 2.

MISJOINDER.
See Plea and Pleading, 6.

MODUS.
See TITHES.

# MORTGAGOR AND MORT-GAGEE.

See ESCHEAT.
EVIDENCE, 1.

1. The costs of several mortgagees held to be payable according to their priorities, although the estates were by order of the Court sold, and the purchase-money was paid into Court, and formed one general fund. Barnes v. Racster,

2. A. having two estates, mortgages both to B., then one to C., then both again to B. to secure both the original and a further advance, then both to The puisne incumbrancers have notice of the prior charges. estates are not sufficient to pay all the mortgages, but one of the estates called No. 32 is sufficient to pay B. in full. The Court will not, as between C. and D., marshal the securities by directing B. to take his full payment out of No. 32, so as to leave C. the first incumbrancer on the other estate, but B.'s debt must be thrown rateably on both estates. 3. The executor of a mortgagee, a

memorial of whose security was registered under the Middlesex Registry Act, conceiving that the memorial was invalid, affected to re-execute the mortgage deed, by signing and sealing it himself in the presence of two witnesses, whose names were indorsed as witnesses attesting his execution of Neither of the witnesses had attested the execution of the deed by any of the other parties. After this ceremony the executor memorialized the deed in due form:—Held, that the whole course of proceeding (which was said to be in accordance with the practice before the registrar) was nugatory for the purpose of the Registry Act. Essex v. Baugh,

 A subsequent incumbrancer, who at the time of taking his security, has no notice of the prior incumbrance, may, by properly memorializing his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective.

Ibid.

- 5. A person mortgages an estate, and, by his will, after directing payment of his debts, devises all his residuary real estates, (including the mortgaged estate), and all his residuary personal estate to his eldest son, whom he appoints his executor. The son proves the will, and dies intestate, without having paid off the mortgage. Both father and son leave sufficient personal assets to pay off the mortgage: -Decreed, on the authority of modern cases, but reluctantly, and against the opinion which independently of them the judge would have entertained, that as between the heir and administrator of the son, the mortgaged estate is the primary fund for payment of the mortgage. Earl of Clarendon v. Barham,
- 6. Form of inquiry in a bill of foreclosure suit, where the defendant suggests by his answer that the plaintiff has been in possession and paid himself interest. Dobson v. Lee, 714

### MULTIFARIOUSNESS.

The Court, under the circumstances of the case, declined to entertain an objection for multifariousness at the hearing. Consett v. Bell, 569

### NEXT OF KIN.

See LETTERS OF ADMINISTRATION.
PLEA AND PLEADING, 13.

# NEW ORDERS.

See Plea and Pleading, 9, 10. Practice, 3, 4, 6, 7, 8, 9, 13, 17.

### NOTICE.

See TRUST AND TRUSTEE.

# OFFICIAL ASSIGNEE.

An official assignee, disclaiming all

interest in the suit, may be dismissed at the hearing, with costs, to be paid to him by the plaintiff; but in such case he must disclaim absolutely, either by his answer or at the bar. Clarke v. Wilmot, 53

#### PARTIES.

See Costs.

PLEA AND PLEADING.

- 1. A person having a claim against a testator's estate prevailed upon the executors to hand over to him part of the testator's assets under circumstances from which he must have known that in so doing the executors were acting hastily, improvidently, and against their duty as executors:

  —Held, that such person was a proper party to a suit instituted by a legatee against the executors for the administration of the estate, although the bill contained no charge of collusion or insolvency. Consett v. Bell, 569
- 2. A person appointed by will receiver of the testator's real estates with a salary, is a proper party to a suit for the administration of those estates.

  1bid.

# PARTNER AND PARTNERSHIP.

See JOINT-STOCK COMPANY.

- 1. Where a partner is required, at the suit of a person entitled to ask it, to give discovery as to matters contained in the usual course of business in the partnership-books, it is no excuse for his not giving that discovery to allege generally that his copartners refuse to allow him access to the partnership-books. Taylor v. Rundell, 128
- 2. Upon the dissolution of the partnership of A. and B. it was agreed that B. should undertake the business of winding up the affairs of the firm:

  —Held, that B. was not solely chargeable with the loss occasioned by the injudicious sale of part of the part-

nership effects, inasmuch as A. still retained his general rights as a partner, and consequently had full power to prevent the sale. *Cragg* v. *Ford*, 280

3. Quære, whether, upon the dissolution of a partnership not under articles, a partner has an inherent right in that character, without the assistance of a court of equity, to insist upon the sale of the partnership effects?

1 Ibid.

4. Held, under circumstances shewing a general acquiescence in the acts of his copartners, that one partner was liable to share the losses arising from certain adventures entered into by the copartners, in breach of the terms of the partnership articles. Ibid.

### PAUPER.

The Court refused to dispauper a plaintiff, although in the possession of property, and in the exercise of a business; the possession of the property being wrongful, the wrongful possession acquiesced in by the adverse party, and the business being necessary to the maintenance of himself and family. Perry v. Walker,

# PAYMENT OF MONEY INTO COURT.

See Injunction, 1. Vendor and Purchaser, 1.

PLEA AND PLEADING.

See Account.

Amended Bill.

Annuity, 1, 2, 3.

Costs.

Multifariousness.

Parties.

Partner and Partnership.

Poor Rate.

Practice.

Statute of Limitations, 7, 8, 9.

Vendor and Purchaser.

1. The case of Moores v. Choat, 8

Sim. 508, approved. A bill was filed upon the authority and under the circumstances of Flight v. Bentley. After issue joined, the case of Moores v. Choat was decided, and the decision was soon afterwards published by the regular Reporter of the Court. The plaintiffs then entered into evidence:—Held, that, although the plaintiffs, instead of entering into evidence, might have applied to the Court by interlocutory motion to have the bill dismissed without costs, yet, as that application was not of a usual nature, they were entitled to have the bill dimissed, without costs, at the hearing. Robinson v. Rosher.

2. If a bill is correctly filed on the authority of a reported case, there being no authorities in conflict with it, and the decision in the reported case is afterwards reversed, the plaintiff in the suit, filed on its authority, is entitled, on motion, to have his bill dismissed without costs. *Ibid.* 

3. On a bill filed against an executrix for payment of a legacy, the defendant, by her answer, admitted assets, but insisted, that, under the circumstances stated in her answer, she had paid the legacy:—Held, that the plaintiff had a right to read the passage of the answer in which she admitted assets, without reading the passage as to payment of the legacy. Connop v. Hayward,

4. Where matters are stated by the answer which are not put in evidence, it is in the discretion of the Court to direct enquiries as to these matters before the Master. Ibid.

5. A settled account, suggested by the answer, but not proved, is usually the subject of enquiry. *Ibid*.

6. One of several cestui que trusts having taken the benefit of the Insolvent Act, joins as a co-plaintiff with two others of the cestui que trusts in a bill to carry the trust deed into execution; the assignee of the insolvent

being a defendant, and the bill alleging that there is a surplus coming to the insolvent after payment of all his debts. This is not a misjoinder of which advantage can be taken at the hearing; and semble that it is no ground of demurrer. Eades v. Harris,

7. With respect to the effect which such assignments have upon the suit, there is no distinction between assignments pendente lite of equitable interests by plaintiffs, and similar assignments by defendants.

1bid.

8. Enquiry directed as to defendants being out of the jurisdiction.

10id.

9. A trustee may file a bill against his co-trustee to recover the trustfund, without making the cestui que trusts parties; and where the trust is under a devise of real estate for sale, with power to give receipts, this general rule of pleading is corroborated by the 30th of the Orders of August, 1841. May v. Selby, 235

10. The 40th of those Orders is also applicable in such a case where the objection is only taken at the hearing.

11. A bill to affect real assets must be brought by the plaintiff, on behalf of himself and all other the creditors of the testator.

Ibid.

12. A bill brought by a purchaser for the specific performance of an agreement to sell lot A. as described in the particulars of sale, was resisted by the vendors on the ground (stated in their answer) that by an arrangement, to which the plaintiff was a party, part of lot A., as described, was deducted from that lot and added to lot B.:—Held, that the plaintiff, on amending his bill and putting in issue this averment, was bound to make the purchasers of lot B. defendants to the suit. Mason v. Franklin, 239

13. Where property is bequeathed to A. for life, and after his decease to such persons as shall then be the testator's next of kin;—upon a bill filed for the protection of the property, the next of kin of the testator living at the time of filing the bill must be made parties to the suit. Wardell v. Claxton,

14. To a bill brought by a married woman against her trustees in respect of her separate property, the husband should be a defendant. Thorby v. Yeats,

15. Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool, through which ran a stream from the mountains, depositing, in its passage, mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, shine, deposit, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off, any soil, oxide of iron, ochre, shine, deposits, or mineral substances, already deposited, or thereafter to be deposited, upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law brought by them against the defendant, and not in an issue or action directed by the Court. Thomas v. Jones. 510

16. Upon the construction of a will, comprising a mixed fund of realty and personalty:—Held, that certain persons were not legatees in remainder of the residue, but postponed pecuniary legatees, and therefore that they were not necessary parties to a suit for the administration of the testator's assets. Pulyeley v. Rawling,

### POLICY OF ASSURANCE.

See Husband and Wife.

1. Feme covert, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as a collateral security for a provision settled upon her under that instrument by the covenant of her husband:—Held, that upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid. Burridge v. Row,

2. The voluntary payment of premiums on a policy of assurance confers on the payer no interest in the policy.

1bid.

### POOR RATE.

An information lies to compel the restitution of money improperly applied out of funds raised for the relief of the poor by means of rates and assessments. The application of any part of a fund raised for the relief of the poor to the payment of the bill of costs of an action brought against an officer of the guardians of the poor, for a libel upon him in respect of acts done by him in the execution of his duties, is a breach of trust on the part of the holder of that fund. Attorney-General v. Compton, 417

POWER OF APPOINTMENT.

See APPOINTMENT.

POWER OF LEASING. See AGREEMENT, 3.

PRACTICE.

See AMENDED BILL.
CHARITY.
COSTS.
INJUNCTION.

See Interrogatories.

Multipariousness.
Pauper.
Payment of Money into
Court.
Plea and Pleading.
Principal and Agent, 2.
Receiver.
Revivor.
Supplemental Bill.
Vendor and Purchaser.

1. Semble, that the 4th and 5th sections of the stat. 5 Vict. c. 5, relate to different subjects. To authorize an application to the Court under the former section, it must be founded on affidavit expressed in positive terms. Ex parte Field,

2. Where a document in the possession of the defendant is produced and read by the plaintiff at the hearing, under a general order for its production, the defendant will not be allowed to read from his answer any statement in explanation or qualification of the document, (except as to the possession of it); but the Court, if necessary, will direct an inquiry on the subject. Miller v. Gow, 56

3. In order to enable the plaintiff to file a note under the 21st of the Orders of Aug. 1841, there must be an affidavit of appearance entered. Treweek v. Turner,

4. To obtain a writ of sequestration under the 9th of the Orders of August, 1841, the affidavit must state that the person suing forth the writ of attachment verily believed that the defendant was in the county, not resident in the county into which the writ was issued. Storer v. Great Western Railway Company, 180

5. On return non est inventus to a writ of attachment, the Court will order a serjeant-at-arms.

1bid.

6. To support a motion under the 24th of the Orders of August, 1841, for leave to enter a memorandum of

service of a copy of the bill, it is necessary to shew the nature of the suit, and the mode of service. Haigh v. Dixon.

1bid.

7. To support a motion under the 24th of the Orders of August, 1841, some evidence should be given that the party served with a copy of the bill was not an infant. Goodwin v. Bell, 181

8. In a suit for administering the real estate of a testator, the devisees of the real estate subject to a power of sale given to trustees by the will for the purpose of paying debts, are persons against whom "no direct relief" is prayed, within the meaning of the 23rd of the Orders of August, 1841. Lloyd v. Lloyd, 181

9. The Court will, generally speaking, not act upon the strict terms of the Orders of August, 1841. *Husham* v. *Dixon*,

10. A defendant obtained an order "to answer, plead, or demur, not demurring alone." The words "plead, &c.," were afterwards, on motion, struck out of the order. The defendant then filed a plea. Ordered, that the plea should be taken off the file, with costs to be paid by the defendant. Brooks v. Purton, 278

11. Practice as to costs of dismissing bill where the sole plaintiff becomes insolvent, and the sole defendant is his assignee with a vesting order. Daniel v. Harding, 436

12. To obtain the usual decree in a creditor's suit, it is not sufficient for the plaintiff to put in an acceptance of the testator, proved as an exhibit. Quære, whether any evidence should be given of the consideration. Keaton v. Lynch,

13. To obtain an order for entering an appearance under the 8th of the Orders of August, 1841, it must appear from the affidavit of service where the defendant was served. Davis v. Hole.

14. Where pending an administra-

tion suit, a suit is instituted by legatees praying no further relief than might be had in the administration suit, the parties to the administration suit ought to apply to have the proceedings in the legatees' suit stayed; otherwise the costs of the latter suit may be dealt with as costs in the former. Therry v. Henderson, 481

15. Where two suits involve the same subject-matter and the same parties, and a decree is made in one of them, the Court will in some instances direct the hearing of the other suit to stand over, until that in which the decree is made is heard on further directions. Cumming v. Slater. 484

16. Although different suits may involve the same subject-matter and the same parties, the Court will not decline to make a separate decree in each suit, unless the frame of the two suits and the relative position of the parties to each be the same. Godfrey v. Maw,

17. Practice in this Court as to entering an appearance under the 8th of the Orders of August, 1841, altered. *Hudson* v. *Martin*, 551

18. Where a decree has been had against several defendants, with costs, and one of them has been compelled to pay the whole costs, the Court will by consent decree contribution between the co-defendants, on motion in the same suit. Pitt v. Bonner, 670

19. Injunction to stay proceedings in the Court of Bankruptcy, under stat. 1 & 2 Vict. c. 110, after decree in this Court for an account against the party taking those proceedings, refused under special circumstances. *Perry* v. *Walker*, 672

### PRESUMPTION.

See DEBTOR AND CREDITOR, 3. EVIDENCE. WILL, 1.

1. Presumption that a party died D D D 2

at a particular time within the seven years after he had been last heard of; the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of the hurricane months. Sillick v. Booth.

2. Where the inability of an administrator to purchase an estate with his own money is relied upon as a ground for following that estate as part of the intestate's assets, such inability must be shewn by evidence of facts from which the strongest conclusion can be drawn, and not merely or principally by evidence of the opinions of witnesses, though such witnesses may have been well acquainted with the affairs of the party, and their testimony may be corroborated by circumstances of suspicion. Wilkins v. Stevens. 431

## PRINCIPAL AND AGENT.

- 1. An admission by an agent, that he has sold property of his principal upon credit, will not entitle the principal to an inquiry as to wilful default, if the agent insist by his answer that the credit was given in the usual way of business, and the plaintiff make out no case to the contrary. Pelham v. Hilder,
- 2. In a suit against an agent, the Court will not, at the hearing (except in an extreme case), direct payment of the costs up to the hearing, but will reserve the question of costs till further directions. Jellicoe v. Price,

### PRINCIPAL AND SURETY.

- 1. Surety in a joint and several promissory note is a competent witness for the note creditor in a suit brought by him for administering the assets of the principal debtor. Wright v. Lockwood,
- 2. A. having joined as a surety for B. in a bond to C. for securing the

payment of the interest of a principal sum secured by a mortgage from B. to C., and having also executed a warrant of attorney as a collateral security with the bond, afterwards executed to C. a letter of attorney authorizing C. to take possession of a rectory and glebe lands, of which A. was the incumbent, and of certain freehold lands and hereditaments of which he was seised in fee simple, and to hold such possession, and receive and take the tithes, fees, perquisites, emoluments, rents and profits thereof. until thereby and therewith, or otherwise, he should be paid the interest secured by the bond and warrant of attorney:—Held, that the letter of attorney operated not me rely as a letter of attorney, but also as a charge on the freehold estates, and that C. was entitled to retain possession of the freehold estates until by means of the rents and profits all arrears of the interest should be satisfied, notwithstanding the death of A., and the revocation by that event of the power of attorney. Spooner v. Sandilands, 390

### PRIORITY.

See Annuity.

MORTGAGOR AND MORTGAGEE.

# PRODUCTION OF DEEDS AND PAPERS.

# See PRACTICE.

1. To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or contain evidence which he intends or is entitled to use in support of his case; it must contain no matter supporting the plaintiff's title or the plaintiff's case, or impeaching the defence, and the defendant must aver by his answer, with a reasonable degree of distinctness, that the document does con-

### SERJEANT AT ARMS.

STATUTE OF LIMITATIONS, 763

tain no such matter. Combe v. Corporation of London, 631

2. Production of cases and opinions of counsel thereon, relating to the matters in issue, refused.

Ibid.

# PROMISSORY NOTE.

See PRINCIPAL AND SURETY, 1.

PROMOTIONS.
See Pages 204, 265.

### RECEIVER.

See Parties, 2.

VENDOR AND PURCHASER, 1.

1. Where one of two trustees of real cstate declines to act, the Court will appoint a receiver on behalf of infant cestui que trusts; but with liberty to either of the trustees to offer himself. Tait v. Jenkins, 492

2. A receiver may be appointed at the hearing, though not prayed for. Osborne v. Harvey, 116

RECTOR.

See TITHES.

### REVIVOR.

Upon the death of a sole plaintiff, this Court declined to make an order that his representatives should revive within a certain time, or the bill stand dismissed. Dryden v. Walford, 625

ROMAN CATHOLIC.

See Infant.

SCHEME.

See CHARITY, 2.

SEQUESTRATION.

See PRACTICE, 4.

SERJEANT AT ARMS.

See PRACTICE, 5.

SHIP'S HUSBAND.

See Joint Stock Company, 3, 4.

SLAVE COMPENSATION.

See Colonies. Will, 23.

SOLICITOR.
See Attorney.

SPECIFIC LEGACY.

See LEGACY AND LEGATER.

SPECIFIC PERFORMANCE.

See AGREEMENT.

ANNUITY.

PLEA AND PLEADING, 12. VENDOR AND PURCHASER.

STAMP.

See Evidence, 3.

STATUTE OF FRAUDS.

See AGREEMENT, 10.

STATUTE OF LIMITATIONS.

See LEGACY AND LEGATEE, 1.

1. H. died in 1811, having bequeathed a legacy to a woman who afterwards married the plaintiff. In December, 1825, the two executors of H. gave the plaintiff a written acknowledgment whereby they separately and jointly acknowledged that they owed the plaintiff £150 for the legacy, and £50 for interest. In 1835, the plaintiff's wife died. Matters of business having occurred between the plaintiff and the executors, in which mutual demands and accounts arose, the plaintiff, in September, 1839, brought his action against the executors to recover what he alleged to be due on those accounts, including the £200 mentioned in the memorandum, and interest thereon. In this action the defendants pleaded separately, and

one of them paid £46 into Court, which the plaintiff received and abandoned the action as to him. plaintiff then filed his bill against both defendants for payment of the legacy, and in defence to the bill the defendants, amongst other things, insisted by their answers on the Statute of Limitations (stat. 3 & 4 Will. 4, c. 27), and that the action was a bar to the demand in equity:—Held, 1st. That the written memorandum amounted to an acknowledgment taking the claim to the legacy out of the operation of the statute. 2ndly. That. whether it amounted to an admission of assets or not, it gave the plaintiff no right of action. 3rdly. That, unless equivalent to an admission of assets, it did not create a personal demand against the defendants, enforceable in a court of equity. 4thly. That it had not the effect of barring or prejudicing the right of the plaintiff's wife in the legacy, or his title in right of his wife as a legatee. 5thly. That the proceedings in the action did not necessarily amount to an estoppel of the suit in equity, but that, in order to determine the efficacy of the suit, it was competent for this Court to inquire on what account the £46 was paid into Court in the action. 6thly. That the plaintiff was not entitled to arrears of interest on the legacy beyond six years before the filing of the bill. (See stat. 3 & 4 Will. 4, c. 27, sect. 42.) Holland v. Clark,

2. In order that an acknowledgment may have the effect of taking a demand out of the operation of the Statute of Limitations (stat. 3 & 4 Will. 4, c. 27), the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand. Therefore, where a bill was brought against two

executors for payment of a legacy bequeathed to the plaintiff's wife, and for arrears of interest accrued since her death, and the plaintiff, with a view of taking his demand for interest out of the operation of the 42nd section of the statute, relied on certain letters written by one of the executors to his the plaintiff's attorney:—Held. 1st. That the letters had not the effect ascribed to them by the plaintiff, because they had been written by the party, not for the purpose of charging himself, but of throwing the burden of payment on the co-executor. 2ndly. That even if they had been written for the purpose of charging himself, it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out letters of administration to his wife.

3. In order to prevent the operation of the Statute of Limitations in a court of equity in a matter of simple contract, it is sufficient if the bill be filed within six years after the accruer of the right to sue, although the subpæna be not sued out till after the expiration of that period. Coppin v. Gray.

4. Quære, whether the Statute of Limitations can be pleaded in bar of a bill filed to enforce payment out of the separate estate of a married woman of a bill of exchange given by her in her separate capacity. Ibid.

5. Upon the death of a testator who had devised his real estates for payment of his debts, a bill was filed on behalf of his creditors, both by specialty and simple contract, to have his assets administered and his real estates marshalled. In that suit a receiver was, in 1821, appointed of all his estates. It was afterwards discovered that the testator had died seised of an estate which had not passed by his will but had descended to his heiress-at-law, M., upon whose

death, in 1822, it descended to O. In 1840, eighteen years after M.'s death, a supplemental bill was filed against O. by one of the plaintiffs in the original suit, being a simple contract creditor of the testator, praying to have the benefit of that suit as against the descended estate: -Held, that as the original suit was treated as a suit for the administration of all the testator's real estates, and as the plaintiff sought to affect the descended estate by standing in the place of the specialty creditors, he was not barred by the Statute of Limitations, but was entitled to have the descended estate marshalled in his favour. Vickers v. Oliver.

6. A simple contract creditor who has acquired a right of marshalling real estate is not barred by the lapse of less than twenty years.

10id.

7. A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, and before the bill arrived at maturity went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved by his executors in England; and within six years after his death a creditor's bill was filed against the executors:—Held, that the plaintiff was not barred by the Statute of Limitations. Story v. Fry, 603

### SUPPLEMENTAL BILL.

Upon the bankruptcy of a defendant in a co-partnership suit, the Court declined to make an order that a supplemental bill should be filed within a given time against the assignees, or the bill stand dismissed. *Manson* v. *Burton*, 626

## TENANT FOR LIFE.

See Advancement.
Interest of Money.
Will.

Upon a bill filed by an infant devisee for life, without impeachment of waste (except as to ornamental timber), praying the establishment of the will, the administration of the trusts, and maintenance, an inquiry was directed as to timber in the form adopted in Tooker v. Annesley, 5 Sim. 235, excluding ornamental timber. Consett v. Bell, 569

## TESTAMENTARY INSTRU-MENT.

### See WILL.

A. executed an instrument purporting to convey to B. all the household furniture, plate, watches, clocks, books, monies, securities for money and other effects, which at the time of A.'s decease should be in two specified rooms in his mansion-house, except an iron chest and its contents, and the contents of a certain closet. A. lived almost exclusively in the two rooms mentioned in the instrument. and B. at the time of the execution of it and from thenceforth until A.'s death, was his bailiff and confidential agent. Two years after the date of this instrument, A. made his will, by which he bequeathed his plate, jewels, household furniture, and money to trustees, upon certain trusts for the benefit of C. and his issue. In a suit for the administration of A.'s estate, B. claimed the benefit of the prior instrument, but without either producing probate of it or shewing for what consideration or under what circumstances it was executed:—Held. that if the instrument was to be considered as testamentary, this Court could not act upon it without probate, and that if it was to be considered as a deed inter vivos, this Court would not give effect to it without

further evidence in its support. And this Court being of opinion, that under the circumstances of the case, such further evidence could not be obtained, declined to direct any inquiry on the subject. Consett v. Bell, 569

### TIMBER.

## See TENANT FOR LIFE.

### TITHES.

- 1. On a bill filed by a perpetual curate against occupiers for the tithes of hay and certain small tithes, it appeared probable from the evidence that, previous to the year 1715, the curate only received the tithes by permission of the lay impropriator; but, it was proved, that since that period he had, to a certain extent, received tithes, or a compensation for tithes, and that no tithes of any description had ever been demanded by or paid to the impropriator:—Held, that the curate's title to tithes was established, but issues were directed to try the existence of certain moduses, set up by the defendants. Oliver v. Latham.
- 2. To a bill for the tithes of hav within a certain parish, it was averred by the answer, that there is within the said parish a piece of land called D., and that by a good and laudable custom, observed within the said parish, from time whereof the memory of man is not to the contrary, the said piece of land called D. hath been, and is, and of right ought to be enjoyed by the impropriate rector of the said parish, or other owner for the time being of the tithes of hay of certain lands within the said parish, in lieu and full satisfaction of and for the tithes of hay of such last-mentioned lands: - Held, that this modus was well pleaded as a custom within the parish, and that the expression, "or other owner," did not render it had for uncertainty.

3. In a suit, by a vicar or perpetual curate, against occupiers for tithes, the evidence of a landowner within the same parish is not admissible on behalf of the defendants.

1bid.

4. A person with notice that the small tithes of a certain parish are payable to the vicar, obtains an assignment of a lease of the great and small tithes, the grantors of such lease being the trustees of a charity, who are entitled to the great tithes only, but who have always in form granted leases of both kinds of tithe. The assignee being unable to recover the small tithes at law, procures, at law, an apportionment of the rent. This Court, under such circumstances, will relieve against the apportionment. Attorney-General v. Dixon, 614

### TRUST AND TRUSTEE.

See Appointment, 3.
Costs, 3, 4.
Escheat.
Evidence, 3.
Husband and Wife.
Plea and Pleading, 6, 9.
Receiver, 1.
Will.

Early in 1818, cestui que trust, with power of directing the variation of the trust securities, requested B., who was one of his trustees, to sell out trust stock then standing in the £5 per cents., and invest it in the £3 per cents. In April of the same year, the trustees, B. & H., sold out the stock by power of attorney, and soon afterwards H., at the request of B., joined in a cheque on the bankers who acted in the sale, requesting them to pay the amount to themselves or bearer. In the letter of B. requesting H. to sign the cheque, he stated, as a reason for expedition, that the money was to be paid on Thursday to the yentleman to whom it was engaged. B. afterwards applied the money to his own use. On a bill filed in 1838, by the cestui que trust, to compel H. to replace the money:—Held, that H. was prime facie liable; for that neither of the trustees contemplated an investment pursuant to the direction of the plaintiff; and even if H. had so contemplated, the course taken by him was not required by necessity or convenience. But, inasmuch as it was proved that the plaintiff knew before 1820 that the stock had been sold out, and that he, in several subsequent successive years, received accounts from B., who was his agent and also his debtor, in which were contained entries for interest on stock appearing clearly to be the fund in question, which entries were irregular in amount and dates; and inasmuch as, notwithstanding these circumstances, no communication on the subject appeared to have been made from the plaintiff to H., who was his brotherin-law, from April, 1818, to November, 1837, which was shortly previous to B.'s bankruptcy, the Court directed inquiries to be made with a view to ascertain whether and when first the plaintiff had notice of the breach of Broadhurst v. Balguy, 16

### VENDOR AND PURCHASER.

See AGREEMENT.

JOINT-STOCK COMPANY. PLEA AND PLEADING, 12.

- 1. Where a purchaser is let into possession of the estate under the contract, his dealing with the property in a manner contrary to former usage, or contrary to the usual course of husbandry, may be ground for ordering him to pay the purchase-money into Court, or for the appointment of a receiver; but will not authorize a decree against him to compel him to accept the title on the ground of waiver of objections. Osborne v. Harvey,
  - 2. On a vendor's bill for a specific

performance, the Court will not, either under the old practice or under the 5th General Order of 9th May, 1839, grant a reference as to title before the hearing, if the defendant resists the specific performance on other grounds than that of title, and the Court, on looking at the answer, is of opinion that such other grounds are not merely frivolous. Boyes v. Liddell.

3. On a bill for the specific performance of an agreement, by which A., as agent for B., contracted to let to C. a piece of ground for a term of years, at a yearly rent; it appearing from the evidence that B. intended to let the ground for the building of houses of a particular class, and that if he had authorized A. to act as agent in the letting of the ground, which was disputed, he had told him the purposes for which it was to be let:-Held, that as the agreement did not contain any reference to building, nor any covenant to build, it was not under the circumstances such an agreement as ought to be performed; and a decree for a specific performance was refused. Helsham v. Langley,

4. Facts stated in conditions of sale as the ground of the conditions must be proved. Symons v. James, 487

5. A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it by reason of the alienage of a party through whom he claimed. The purchaser, by his own inquiries, ascertained the defect of title, but did not, till after some months of negotiation with the vendor, repudiate the con-The vendor then filed his bill tract. for specific performance, and pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown: -IIeld, that he was entitled to a decree. Eyston v. Simonds, 608

6. Where by the terms of a devise

or settlement of real estates, the consent of the tenant for life is necessary to enable the trustees to sell the estates; -upon a bill filed by the trustees to compel the specific performance of a contract for sale, the plaintiffs, in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent to the contract was given before the filing of the bill. It is not sufficient for the purpose of obtaining an immediate decree, to prove that such consent was given before the hearing. Adams v. Broke. 627

7. The contract on which an immediate decree for specific performance is sought, must have been complete in all its essential parts before the filing of the bill.

1bid.

- 8. Property was put up for sale by auction, described as "a leasehold ground-rent of £23, reserved by a mesne lease of certain premises for 98 years wanting seven days, and assigned apart from the reversion for the remainder of the term by an indenture of 1817." By the conditions of sale, no title prior to the assignment or the title of any ground or mesne landlord was to be produced. From a recital in the deed of 1817, it appeared that the property out of which the rent issued had been originally demised, with other property, at a rent of £10, subject to the covenants, conditions, and agreements in the original demise contained: -Held, that, under such circumstances, a good title was not made to the rent of £23, inasmuch as it appeared upon the face of the deed of 1817, that, upon failure of payment of the £10 rent, the rent of £23 might be liable to diminution or forfeiture. Taylor v. Martindale, 658
- 9. Where conditions of sale are so obscurely worded, that, when taken in connection with the particulars of sale, they are likely to mislead an or-

dinary purchaser as to the nature of the property offered for sale:—Semble, that the Court will discharge the purchaser from his bargain, on the argument of exceptions to the title, without putting him to the necessity of moving to be discharged from the purchase.

Ibid.

10. Quære, whether the assignment of rent by a reversioner in a lease does or does not carry with it the reversion?

Ibid.

# VESTED INTEREST.

See LEGACY AND LEGATEE.
WILL.

1. By a voluntary settlement, personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one, the whole to be paid to such only child; or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them, as aforesaid, on their attaining twenty-one, if sons, or if daughters, on their marriage, respectively. By his will, the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the funds in question, either on her attaining twenty-one, or on her Lang v. marriage under that age. Pugh,718

2. Upon the particular wording of a will, the Court considered it doubtful whether personal property did not vest immediately in a legatee, although the gift was contained only in the direction to pay at twenty-one or marriage, and there was no disposition of the income during minority.

1bid.

VESTING ORDER. See Practice, 11.

VICAR.
See Tithes.

# VOLUNTARY SETTLEMENT.

See Testamentary Instrument.

Personal estate settled in trust for afterborn illegitimate children. Upon the bill of the settlor, the fund was transferred to him, as against such children. Wilkinson v. Wilkinson,

WASTE.

See TENANT FOR LIFE.

WILFUL DEFAULT.
See PRINCIPAL AND AGENT, 1.

WILL.

See Advancement.
Election.
Testamentary Instrument.

1. Testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of his said estates and effects equally between and among his children, J., M., and C., and his grandson, R., share and share alike; the share of M. to be paid her as soon after his decease as conveniently might be, the share of C. to be paid him at the age of 22, and the share of R. at the age of 21; and in case any of his children or grandchild should die before his or her said share should become so vested as aforesaid, then the share or shares of him, her, or them so dying, should go and be equally divided among the survivors and survivor of them in equal shares and proportions, if more than one, and if but one, then the whole to and for the use and benefit of such survivor. J. and C. died in the testator's lifetime, the latter being under 22. R. survived the testator. but died under 21:-Held, 1st, that the word "vested" must be construed to mean "payable," and that the original shares of the deceased children and grandchild survived to the survivors; and 2ndly, that the word "whole" meant the whole residue. and, consequently, that the accruing as well as the original shares devolved to M., as the sole survivor of the four residuary legatees. Where two persons die by the same stroke or accident. and there are no special circumstances in evidence from which it can be presumed that one died before the other. the law of England will draw that presumption from general circumstances; such as the comparative health, strength, age, or experience of the parties. Sillick v. Booth, 121

2. Testator, after giving at the commencement of his will various pecuniary legacies, and bequeathing all the rest and residue of his ready money, securities for money, and monies in the funds, to trustees upon certain trusts, concluded his will as follows:--" And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever; and I do hereby constitute and appoint her, my said wife, sole executrix of this my will:" -Held, that this clause carried the residue of the testator's property to the wife. Parker v. Marchant, 290

3. Although the words "goods, chattels, and effects" may frequently be considered as having been used by a testator in a restricted sense, yet prima facie their import is general; and there are good grounds for con-

sidering them as used in a general sense, either where they are not placed in connection with words of locality, or where they follow the enumeration of specific articles, or where there are no expressions in the will shewing a doubt in the testator's mind as to their comprehensiveness, or where the bequest in which they are contained is followed up by the appointment of an executor.

Ibid.

4. Testator by his will bequeathed as follows:—I direct in the first place all my debts to be paid. I then give and bequeath to my wife £60,000 £3 per cent. Consols, part of a larger sum standing in my name in the Bank of England; also, I bequeath to A. £10,000, other part of the said £3 per cent. Consols. Also, I give to B. £500, and to C. £100; also, I give to D. and E. all the rest and residue of my ready money, securities for money, and monies in the funds, upon trust to invest, &c., and to pay the dividends to my wife for life, and after her decease to divide the capital amongst F., G., H., and I. testator then, after devising his real estate to the same trustees upon certain trusts, gave all his residuary personal estate to his wife:—Held, that the testator's debts were payable out of his personal and real estate according to the usual order of administering those estates, the general residuary personal estate being first applicable; but that his pecunisry legacies were primarily, if not solely, payable out of the "ready money, securities for money, and monies in the funds."

- 5. A bequest of the testator's "ready money" comprehends money of the testator in the hands of his banker.

  Ibid.
- 6. Quære, whether a bequest "of all the rest and residue of my ready money, securities for money, and monies in the funds," will compre-

hend property of that description acquired after the date of the will? Ibid.

7. Testator, by a codicial, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, and then added, "to the other servants £500 each:"—Held, that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of £500. Ibid.

8. Testator devised certain specified messuages and lands, and all other his messuages, lands, tenements, and hereditaments which might not be in his will particularly described or mentioned, to trustees upon certain trusts. The Court declined to decide whether a leasehold house passed under the general words, without directing a case for the opinion of a court of law.

9. Testator gave the residue of his personal estate to his executors, in trust, to be from time to time, as they should think best, turned into monies for the payment of his debts and legacies; and subject thereto he directed them from time to time to invest the same, with all accumulating produce, in the purchase of other lands, to be situated as conveniently as might be to certain real estates devised by him in a former part of his will; and his will was, that such purchased premises should be conveyed to the same uses &c. as his devised lands; and that the interest and produce of his said personal estate, which should from time to time arise and be made before and until the said money should be so invested, should be paid to the person who would be entitled, under the trusts of his will, to the rents and profits of the said premises if actually purchased, as an addition thereto: - Held, that, subject to the usual provisions for the payment of the testator's debts and legacies, the

tenant for life was entitled to the income, as from the testator's death, of such parts of his personal estate as were at the time of his death, and had since remained in such investments as would have been recognized by the Court as proper; but that, with regard to such parts of his personal estate as were at the time of his death, and had since remained in such investments as could not be so recognized, the rule applied by Lord Eldon to leasehold property in Gibson v. Bott, (7 Ves. 89), and by Sir W. Grant to copyhold in Walker v. Shore, (19 Ves. 387), must be applied in this case. Caldecott v. Caldecott. 312, 737

10. An express direction, by a testator, for the conversion and for investment of his personal property, from time to time as trustees may think fit, will not necessarily prevent the operation of the general rule, that where personal property is given in a series of limitations, it shall be invested in such securities as are approved of by a court of equity for the benefit of parties interested in remainder after the death of the tenant for life.

1016.

11. Testator, by his will, gave to his grand-daughter G., whom he described as the eldest daughter of his the testator's daughter I., an annuity of £100 for her life, in case she should attain the age of 18 years. He also gave to his grandson C., second son of his said daughter I., the sum of £2000, but in case he should die under 21, then he, the testator, bequeathed the said sum to his said grand-daughter G. The testator then having given other legacies and annuities, which as well as the gifts to G., were charged on his real estate, bequeathed the residue of his personal estate and effects in trust for such child of his said daughter I., as should first attain the age of 21 years, for his or her absolute use and benefit. then devised his real estates in trust for his grandson H., the eldest son of his daughter I., for life, with remainders in strict settlement; and by a codicil he bequeathed to his daughter and her husband the use of his plate, linen, and furniture, so long as they should reside in and occupy his house at E. (in which they had a life interest), with a direction that after their decease, or ceasing to reside, the said books, &c. should remain and be held upon the same trusts and purposes as he had by his will declared concerning his residuary personal estate: G. was the eldest child of the testator's daughter I., and attained the age of 21:—Held, that she was entitled to the residue of the testator's personal Shipperdson v. Tower,

12. Testator, after directing his debts, funeral, and testamentary expenses to be paid as soon as conveniently might be after his death, bequeathed several annuities and pecuniary legacies to various persons, directing the legacies, except one which was given to a person under 21, to be paid within 12 calendar months after his death. He then declared that the several annuities thereinbefore bequeathed should be charged upon his real estates. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses, and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy:—Held, that the annuities were primarily, if not solely, charged upon the testator's real estate; and that under the term "legacies," he did not mean to comprise annuities. Ibid.

13. Testator being seised in fee of freehold collieries, for which he received a certain rent, and being entitled to several shares in a leasehold

colliery, bequeathed various annuities and legacies, which he charged upon his real estate in aid of his personalty. He then by a codicil directed that all annuities and legacies left by him in his will, his real estate being free from all mortgages, &c., should be paid out of the certain rents and profits of his collieries, and that his estate might not be burdened with them:—Held, that the word "collieries" in the codicil meant the testator's freehold collieries, and did not refer to his shares in the leasehold colliery; and that it was not the object of the codicil either to relieve or burden the personal estate, but only to throw on the freehold collieries such burden as would otherwise have fallen on the whole real estate. Ibid.

14. Testator, after devising his real estates in strict settlement, subject to the payment of his debts and legacies, declared that it should be lawful for his trustees, and he authorized and empowered them, if they in their discretion should think fit, absolutely to sell his estate at C.; and after giving them full powers in regard to the conduct of the sale, he directed and declared that they should stand possessed of the monies arising from the sale upon trust, after payment of all costs, to apply and dispose of the remainder in such manner as thereinbefore had been directed concerning the residue of his the testator's personal estate. One of the trustees was afterwards removed from his office by The sale of the estate was not required for the payment of debts or legacies: - Held, that the power of sale vested in the trustees was discretionary, and that the residuary legatee of the personalty could not compel a sale. Ibid.

15. There were two inconsistent clauses in a will. By the former the surplus rents of the testator's real estates, after maintenance of the per-

son entitled to the possession until 25. were added to the residue of the per-By the latter the sursonal estate. plus rents, after maintenance of such person until 21 (provided his attaining 21 happened within the legal limit of time), were settled upon the same trusts as the realty. Testator then by a codicil reciting the former clause. directed that the person entitled to the possession of the estate should be let into the receipt of the rents and profits at 21:—Held, that, as the codicil merely affected the surplus rents between the ages of 21 and 25, and as in other respects the latter of the two clauses in the will was more probably consistent with the testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil. Ibid.

16. The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative.

1bid.

17. Residuary personal property held to be vested in A. and B. in equal moieties, and descendible in the same proportions to their respective children, notwithstanding words giving the property to the survivor "in the event of the death of either;" the word "death" being held to refer to death in the testator's lifetime. Clarke v. Lubbock, 492

18. Testator, possessed of personal property only, by his will directed that the interest on his property should be divided into four equal shares: one share to be given to his wife for life, and then to devolve to his children and the longest liver in equal shares; the remaining three shares to be divided equally between

his three children and their heirs; "should all my children die without heirs, my property in that case to be divided equally between the children of my brothers and sisters alive on the death of my last child." At the date of the will no brother or sister of the testator had died leaving issue:

—Quære, whether the limitation over in the event of all the testator's children dying without heirs is void. Garratt v. Cockerell, 494

19. Under a lease for years, the lessees had an option to purchase the fee simple of the demised lands. After the date of the lease, the owner made his will, whereby he devised the lands, specifically describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee simple of the lands:-Held, upon the special terms of the will, that the purchasemoney did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life interest in the purchase-money. Drant v. Vause, 580

20. Testator bequeathed a legacy to "The London Orphan Society in the City Road." There was no institution precisely answering this description; but there was a "London Orphan Asylum" at Clapton, and an "Orphan Working School" in the City Road:—Held, that the former institution was not, and that the latter was, within the description contained in the will. Wilson v. Squire,

21. Parol evidence to explain a will rejected. Ibid.

22. Testator, by his will, directed that his trade should be carried on by his daughter and others, as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the funds, and the

funds held in trust, as to one moiety, for the benefit of the daughter and her children, and as to the other moiety for the benefit of the children of his brother. By a codicil, the testator revoked that part of his will which empowered his trustees to sell his effects, and instead thereof, he authorized his daughter to take possession of all furniture, stock in trade, and every description of property found on his, the testator's, premises, to be disposed of at her discretion:— Held, that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will. Newman v. Lade, 680

23. By a marriage settlement, £20,000, the fortune of the wife, was assigned to trustees upon trust, subject to life interests of the husband and wife, as to one moiety for the eldest son of the marriage. and as to the other moiety for the younger children. By the same settlement, a certain plantation in Jamaica, of which the husband was seised in fee-simple, was conveyed to the use of trustees for a term of 500 years, upon trust, if the husband should so appoint, to raise £10,000 for his absolute use, and subject to such term, and to the life-interests of husband and wife, to trustees for 1000 years, upon trust to raise £20,000 for the eldest son, £10,000 for the younger children, and again £10,000 for the eldest son. settlement contained a proviso that the portions should be raised according to their priority, as stated in the Soon after the marriage settlement. the husband exercised his right of raising £10,000 for his own use, and for that purpose the trustees of the 500 years' term borrowed of the trustees of the wife's fortune £10,000, and executed to the latter a mortgage of the premises comprised in the 500

vears' term. The husband and wife died, leaving five children of the marriage; the husband having by his will, after directing payment of his debts, and devising certain property not situated in Jamaica, devised all his residuary real and personal property to his eldest son, J., and appointed him his executor. Upon the death of the testator, J. proved the will, acted as executor, and entered into possession of the estates in Jamaica, of which he kept possession, paying the interest of the younger children's fortunes, until 1837, when he became a lunatic, shortly after which he died intestate and unmarried, leaving the four younger children surviving him, of whom W. was his heir-at-law. No arrangement had ever been entered into amongst the children relative to the charges in the settlement, nor was there any strong evidence of the intentions of J. as to the extinguishment of those charges to which he was entitled:—Held, 1st, That, under the foregoing circumstances, it was most for the benefit of J. that his charges on the Jamaica estate should be considered as not having been extinguished in the inheritance, and consequently that they were not extinguished. 2ndly,

That he was not bound to apply the rents and profits which he received in reduction of his charges; but, 3rdly, That a sum for slave compensation money, which he received as "devisee" of his father, must, as between the several charges, be applied in reduction of the first charge of £10,000, and that the personal representative of J. or his father must account for interest ou that sum during the life of J. Clarendon (Earl of) v. Barham, 688

### WITNESS.

See PRINCIPAL AND SURETY, 1.

Quære, whether the mere fact that the plaintiff has filed a replication to the answer of a defendant precludes him from examining that defendant as a witness. Rose v. Clarke, 534

Bankrupt mortgagor is a competent witness for a party claiming an incumbrance prior to the mortgage, to shew that the mortgagee had notice of such incumbrance, but he is not a competent witness to shew that the mortgage was usurious; as the effect of his evidence, in the latter case, would be to discharge his estate from a possible liability to the costs of the suit. Clarke v. Wilmot, 53

END OF VOL. I.



